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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

— v —

STANLEY S. HECHT,
Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement

This is an appeal from a judgment of conviction for criminal contempt of court entered in the United States District Court for the Southern District of New York on June 5, 1957, after a hearing without a jury before Honorable Edmund L. Palmieri, United States District Judge (1, 3).* The contempt consisted of the unexcused failure of the appellant, Stanley S. Hecht, to produce certain books and records of a corporation, World Over Export Trade Corporation, of which he was then the president and a director, although twice ordered to produce these books and records by the District Court in accordance with a subpoena duces tecum dated March 27, 1957 (3).

The Government called two witnesses at the hearing to prove that the non-produced books and records of the

* References throughout will be to appellant's appendix unless otherwise denoted with the suffix "a", in which case such references will be to the Government's appendix.

corporation specified in the subpoena were in the possession and under the control of appellant when the subpoena was served.

Appellant did not take the stand at the hearing, nor did he offer any other evidence to excuse his failure to produce the books and records. The only defense was that the Government had failed to sustain its burden of proof that the specified books and records were in existence at the time the subpoena was served.

On the basis of the uncontradicted evidence, Judge Palmieri held that appellant was in contempt of court and imposed a sentence of 90 days' imprisonment to commence the following day, June 5, 1957, at 4 P. M. (4). In imposing sentence, Judge Palmieri provided that appellant could purge himself of contempt by a proper showing that he had substantially complied with the subpoena duces tecum (22).

On June 5th the hearing was reopened at Hecht's request, and he attempted to explain why the subpoenaed books and records had not been produced (23). The attempted explanation was inadequate, and Judge Palmieri adhered to his original decision and sentence (26). Hecht was released on $5,000. bail pending appeal.

The Facts

World Over Export Trade Corporation (hereafter referred to as World Over) is a corporation organized and duly qualified to do business in the State of New York; Stanley Hecht is the president and sole stockholder of the corporation (6, p. 77 of hearing transcript). As its name indicates, World Over is in the export business. During the year of 1956, it purchased goods from United

States suppliers and, in transactions financed by the International Cooperation Administration, shipped these goods to customers in Vietnam and Cambodia. Early in 1957, the F. B. I. began investigation into charges that World Over and Hecht had made false statements to the I. C. A. in connection with these shipments, in violation of Title 18, United States Code, Section 1001.

Special Agent James Mulroy of the F. B. I. was in charge of the investigation (11a). Its specific purpose was to ascertain the amount and quality of goods shipped by World Over in filling purchase orders from customers in Vietnam and Cambodia under the I. C. A. program (11a). However, this could not be accomplished, because Hecht repeatedly stalled Agent Mulroy in his attempt to inspect World Over's books and records (15a).

Accordingly, a Grand Jury subpoena duces tecum was served on Hecht on March 27, 1957, requiring the production of all books and records of World Over for the calendar year 1956 and the year 1957 up until the time of service, including all correspondence, quotations, invoices, freight bills, export and import licenses, bills of lading, receipts, bank statements, checks, letters of credit and the corporate tax return for the year 1956 (6a).

Thereafter, on April 1, 1957 Agent Mulroy was permitted to inspect the books and records at World Over's offices. The inspection took three days. Agent Mulroy found file material relating to World Over's transactions with its customers in Vietnam and Cambodia, and other records of no importance in the pending investigation, such as invoices for office supplies (12a, 13a). But he could find no records—not a letter, a purchase order, an invoice, or a cancelled check—related to World Over's purchase of the goods with which it filled the orders placed by its Far Eastern customers (11a, 14a, 15a).

The investigation into the charges that World Over had cheated its I. C. A. financed customers was thus temporarily thwarted.

For this reason, Hecht appeared before a Grand Jury in the Southern District of New York on May 15, 1957, pursuant to a second subpoena, and there questioned concerning the missing corporate books and records.* He consistently refused to answer all such questions on the grounds that his answers might tend to incriminate him (7). Hecht was then taken before Judge Walsh who, after a hearing, directed him to produce the corporate records called for by the subpoena and to answer questions of a general nature relating to these records (7).

Hecht appeared before the Grand Jury again on May 17, 1957. He produced no additional corporate books and records and, despite Judge Walsh's direction, he persisted in his refusal to answer general questions about them (7). He was again brought before Judge Walsh, who repeated his previous direction (7).

Thereafter, Hecht appeared a third time before the Grand Jury. Again he produced none of the books and records which the Grand Jury sought. On this occasion, Hecht did, however, answer some general questions (8). He admitted that he handled the filing of invoices, cancelled checks, purchase orders and other important papers relating to purchases by World Over from suppliers in the United States (Gov't. Ex. 4 at hearing, p. 10). But when pressed, he again invoked the Fifth Amendment (Gov't. Ex. 4 at hearing, pp. 1-3).

* Hecht appeared before the Grand Jury on May 15, 17 and 28, 1957; the stenographic transcripts of his testimony were marked in evidence at the hearing as Government's Exhibits 2, 3 and 4 respectively.

In his three appearances before the Grand Jury and his two appearances before Judge Walsh, Hecht had not produced a single record relating to World Over's purchases from United States suppliers. Nor had he offered any adequate explanation for his failure to do so. The Government, therefore, asked that he be found in contempt of court.

A hearing on the contempt charge was held before Judge Palmieri on June 4, 1957 in accordance with Rule 42(b) of the Federal Rules of Criminal Procedure.*

The Government called two witnesses to prove that the missing corporate books and records had been in Hecht's possession at the time the subpoena was served.

The first witness, Sigmund Cohn, was a former employee of World Over, having worked for the corporation at the time the I. C. A. transactions under investigation had been consummated during the middle of 1956. Cohn testified that he had prepared the purchase orders for the goods purchased by World Over from U. S. suppliers at Hecht's direction, placing one copy and a signed copy returned by the supplier in the corporate files (21-22). He also testified that invoices received from the suppliers, copies of cover letters typed by him when payment was made to the suppliers by check, and various packing slips and shipping papers received by World Over from its packer in New York City were all placed by him in the corporate files during May and June, 1956 (2a-4a, 9a).

According to Cohn, the quality of textiles shipped to World Over's customers in Vietnam was inferior to the

* Stipulations were entered into between counsel for appellant and the Government waiving the notice requirement of Rule 42(b) and trial by jury.

quality ordered "most of the time" (6a), and in 85 or 90 per cent. of the textile orders filled there were shortages, sometimes as great as 70 per cent. (7a, 8a).

The second witness for the Government was Special Agent Mulroy, who testified concerning his examination of World Over's files. He told of his failure to find any corporate records, which had been filed by Cohn, through which he could trace the goods purchased by World Over from its U. S. suppliers (11a, 14a). Agent Mulroy also testified that fairly complete records relating to the transactions between World Over and its Far Eastern customers were found in the corporate files (12a, 13a).

The Government then rested its case, and appellant's counsel stated that he had no witness or proof to submit (18a). Counsel thereafter made a statement to the Court in which he suggested how the missing records might have disappeared, but this, of course, was not evidence in the hearing.

Judge Palmieri, in adjudging appellant guilty of contempt, found that the subpoenaed records had been in existence at the time that the subpoena was served, and that Hecht had failed to provide an adequate excuse for their non-production. In the Court's opinion this was a clear case of wilful contempt (19a, 20a).

Judge Palmieri sentenced Hecht to three months imprisonment and directed that he surrender the following day, June 5, 1957, at 4:00 p. m. (20a). Bail was fixed at $5,000. until time of surrender (20a).

On the following afternoon, at the time fixed for surrender, new counsel appeared for Hecht. He asked that the hearing be reopened so that Hecht might purge him-

self by explaining why the missing books and records had not been produced (23). The Court agreed to reopen the hearing (23).

Appellant then testified that World Over had engaged in transactions with customers in some fifteen countries in the previous year, amounting in all to "a couple of hundred thousand dollars". The documents relating to these transactions were, according to Hecht, filed by Cohn (26a). Occasionally he had seen some of the documents on the office floor (24). Hecht said that he remembered he had been unable to locate some invoices in January or February 1957, and he suggested that some of the papers might have been scattered on the floor and thrown out by the cleaning woman (24).

When questioned by the Court as to what had become of the cancelled checks, Hecht suggested that they might have been removed from the office by his accountant; he admitted, however, that he could not explain what had become of all other pertinent documents (28a). On cross-examination, he conceded that the missing books and records had in fact been placed in the company's files and none had been left on the office floor (26a). His only "explanation" for his failure to produce the crucial subpoenaed records was that Cohn had been careless in his filing (29a-30a), but he called no witnesses to support this theory.

Judge Palmieri found Hecht's story incredible and refused to modify his judgment of conviction and sentence (31a).

Statute and Rules Involved

Title 18, United States Code, Section 401

POWER OF COURT

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Federal Rules of Criminal Procedure

RULE 17. SUBPOENA

* * *

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner."

RULE 42. CRIMINAL CONTEMPT

* * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or

of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Question Presented

Should appellant, as president of a corporation whose books and records he was legally obligated to produce pursuant to a subpoena duces tecum, be held in contempt of court where the Government proved by substantial evidence that such books and records were in existence at the time the subpoena was served and appellant offered no adequate excuse for their non-production?

ARGUMENT

Appellant's conviction of contempt must stand because he failed to offer an adequate excuse for non-production of corporate books and records proved beyond a reasonable doubt to have been in existence at the time the subpoena was served on him.

As president and the sole stockholder of World Over, Hecht was legally responsible for the production of its records in response to the grand jury subpoena. *Wilson v. United States*, 221 U. S. 361 (1911). It is conceded that, if the records could have been produced, Hecht was the person legally obligated to do so.

Hecht claims, however, that the Government failed to prove beyond a reasonable doubt that the records were in existence so that they could have been produced at the time the subpoena was served. The short answer is that the evidence overwhelmingly shows that the significant records were in existence when the subpoena was served and were deliberately withheld from the Grand Jury by Hecht.

Cohn's testimony clearly established that World Over had kept extensive records with respect to supplies purchased in the United States for resale to customers in Vietnam and Cambodia. These records included purchase orders, invoices, packing slips, shipping papers and correspondence (2a-4a). And Cohn said he saw this material in World Over's files in July 1956 (11)—only eight months prior to the service of the Grand Jury subpoena.

Agent Mulroy testified that his investigation disclosed that World Over kept fairly complete records with respect to its sales to Vietnamese and Cambodian customers (12a-13a). Yet he was unable to check how the orders for textiles and rubber tires had been filled because every single record which might have provided a useful lead was missing. Thus, although he looked for three days, he could not find a single purchase order, invoice, cancelled check, or letter relating to the purchases of textiles and rubber tires from United States suppliers (14a-15a). Without these records, Agent Mulroy was at a deadend.

Hecht contends that the general ledger and check stubs he turned over to Agent Mulroy gave the names of World Over's suppliers and that Mulroy could have contacted the suppliers and obtained the necessary invoices and purchase orders from them. The argument is specious. Neither the check stubs nor the general ledger showed for what purpose a particular check had been issued, or where in the United States the payee-supplier was located (18a). From an investigative standpoint, the name of a supplier without more was virtually useless.

The suggestion that the Assistant United States Attorney could have obtained the necessary additional information if he had questioned Hecht further is equally specious in view of Hecht's repeated invocation of the Fifth Amendment in response to questions of a far more inocuous nature.

The fact is that Hecht knew at the time he was served with the subpoena that World Over was being investigated in connection with the statements he had filed with the I. C. A. There was substance to the charges that World Over had misrepresented to the I. C. A. the quantity and

quality of goods shipped to Cambodia and Vietnam—as Cohn's testimony at the hearing clearly showed. Thus, Hecht had a strong motive for destroying the records which would enable the Government to check the truth of the statements submitted to the I. C. A.

In this context, Judge Palmieri appropriately observed (19a):

> ". . . it stretches the credulity of the Court for [Hecht] to claim that every single document pertaining to this one phase of his business is missing."

Hecht's belated attempt to explain his failure to produce these documents was hardly calculated to mitigate the Court's incredulity. Hecht admitted that the pertinent documents had in fact been filed (26a). He thought that the shipping papers, purchase orders, and invoices might have been misfiled by Cohn, and that his accountant might have some of the missing cancelled checks (25a, 30a). But this hardly explained the disappearance of every record relating to the transactions under investigation, and Judge Palmieri understandably refused to accept Hecht's story (22a).

The legal principles which govern cases of this kind are well-settled, and the decision in any particular case must turn upon its facts. *United States* v. *Johnson*, decided by this Court on August 16, 1957, Docket No. 24676, — F. 2d —. Where, as here, the Court is reviewing a judgment of conviction in a non-jury criminal case, the evidence must be viewed from a standpoint most favorable to the Government, ". . . which includes, where there is, as here, circumstantial evidence, the indulgence in all permissible inferences in its favor. . . ." *United States* v. *Brown*, 236 F. 2d 403, 405 (2d Cir. 1956).

On the facts of this case, and the permissible inferences to which they give rise, it is clear that the contempt conviction must stand. The burden was upon appellant to present an adequate explanation for his failure to produce the subpoenaed records, and he did not meet that burden. *United States* v. *Fleischman*, 339 U. S. 349 (1950); *United States* v. *Nilva*, 352 U. S. 385 (1956); *United States* v. *Johnson*, *supra*.

United States v. *Johnson* was a stronger case than this one for the appellant, yet this Court affirmed a contempt conviction for failure to produce corporate books and records. There, more than a year had elapsed between the time that the non-produced records had last been seen and the time that the subpoena was served (see page 8 of Government's brief in *United States* v. *Johnson*, *supra*). Here the time interval was only eight months.

United States v. *Patterson*, 219 F. 2d 659 (2d Cir. 1955), upon which appellant places heavy reliance, is distinguishable. There, Patterson had been once sentenced for contempt in failing to produce certain books and records. Upon his release from prison he was again subpoenaed to produce the same books and records, and adjudged in contempt by the District Court for failing to do so. The evidence adduced at the hearing showed that Patterson's possession and control of the books and records had been interrupted during his jail sentence and that others had a motive to destroy them. On these facts, this Court reversed the second contempt conviction. Here, appellant's control of the subpoenaed records was uninterrupted, and there was no evidence that others could, or would want to, destroy them.

Here Hecht's testimony—the only evidence offered in defense of the contempt charge—was on its face incredible. As the Court aptly stated in *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (8th Cir. 1954), *cert. denied* 348 U. S. 916:

> "The District Court did not believe and was not compelled to believe the testimony of the appellant that he was unable to find the books he was ordered to produce. The court was the judge of the appellant's credibility and the weight of his evidence. The appellant's self-interest was obvious. His defense was one easily fabricated and almost impossible to disprove. . . ."

Conclusion

The evidence clearly proved that the non-produced corporate books and records were in existence at the time the subpoena was served and were deliberately withheld by Hecht.

The judgment of conviction and sentence should be affirmed.

Respectfully submitted,

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York,
Attorney for United States of America.

WILLIAM K. ZINKE,
ARTHUR B. KRAMER,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

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APPENDIX

Excerpts from Contempt Hearing

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 153-87

UNITED STATES OF AMERICA,

vs.

STANLEY S. HECHT,

Witness.

Before: HON. EDMUND L. PALMIERI, *District Judge*.

New York, June 4, 1957.

APPEARANCES:

PAUL W. WILLIAMS, Esq., United States Attorney, for the Government;

By William K. Zinke, Esq., Assistant United States Attorney.

WILLIAM MERRITT, Esq., Attorneys for the Witness.

* * * *

(15) * * *

SIGMUND L. COHN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Zinke:

* * * *

(21) * * *

Q. Thereafter, Mr. Cohn, were purchase orders prepared in the office of World Over Export Trade Corporation? A. Yes, sir.

Q. Who prepared them? A. I did, sir.

(22)

Q. I beg your pardon? A. I prepared them at the direction of Mr. Hecht.

Q. How many copies did you prepare? An original and how many copies? A. Two original copies and one export copy.

Q. What was the extra copy for? A. The extra copy was a copy to be signed by the supplier of his acceptance.

Q. What was to be done with that? A. To be returned to the importer.

Q. Were the signed copies returned by the suppliers with their acceptance thereon? A. Yes, sir.

Q. Can you tell me of any case where you did not receive the signed acceptance of the purchase order for the purchase order placed? A. No, sir.

Q. Thereafter, to your knowledge, were invoices received from these suppliers by the corporation? A. Yes, sir.

Q. Let me ask you this: What was done with these

purchase orders, the file copy, and also the copy returned with the acceptance? What was done with them? (23) A. They were put together with the respective orders, the papers connected with it.

Q. Where were they kept? A. Kept in the file.

Q. Of the corporation? A. Yes, sir.

Q. How about the invoices that you received from the suppliers? A. They were also placed.

Q. In the files? A. Yes, sir.

Q. And thereafter were payments made on these purchases by World Over? A. Yes, sir.

Q. How were payments made? A. By checks.

Q. Were payments ever made by cash? A. Not that I know of, sir.

Q. As to the payments by check, Mr. Cohn, from your knowledge were they made personally or through the mail? A. Through the mail.

Q. Were letters sent out with these checks? A. Yes, sir.

Q. Covering letters? (24) A. Yes, sir.

Q. Who prepared the letters? A. I did, sir.

Q. Did you prepare a copy of all of the letters you sent out? A. Yes, sir.

Q. What did you do with the copy of the letters? A. Put together with respect to other papers belonging to these transactions.

Q. Where did you put these papers? A. Into the file.

Q. Of the corporation? A. Yes.

Q. There was a file cabinet, is that it? A. Yes, sir.

Q. Now, did you ever see these checks returned canceled? A. The checks?

Q. These checks sent out by the corporation in payment of these goods. A. No, sir, I did not see them.

Q. You did not see the checks? A. No.

Q. Thereafter from your knowledge, do you know (25) whether orders were given to these suppliers by World Over for the delivery of these goods that had been purchased? A. They were given simultaneously in the purchase orders.

Q. What were the orders given to the suppliers? A. To ship this merchandise to the packing house.

Q. What was the name of the packing house? A. The Nu Mar Standard Company.

Q. Would you spell that first name, please? A. N-u M-a-r Standard company or corporation.

Q. Located here in New York City? A. On Green Street.

Q. Were there any papers received from Nu Mar by World Over? A. Yes, sir.

Q. What papers were received by World Over from Nu Mar? A. The packing slips and what was packed by them.

Q. Any other papers that were received by World Over or kept by World Over in connection with these transactions that you can think of? A. Shipping documents.

Q. Were there shipping documents? (26) A. Copies of bills of lading.

Q. Were they also retained in the files of the corporation? A. Yes, sir.

Q. Did you see the orders, Mr. Cohn, received from the far eastern customers, customers in Vietnam?

Mr. Brunner: I am sorry. I did not hear that.

Mr. Zinke: Would you read the question?

(Question read)

Q. Did you see those orders? A. At a later date I saw them.

Q. Do you know what quality goods were called for by those orders?

Mr. Brunner: Objected to as irrelevant and immaterial as to this issue as to whether or not—the issue is whether the documents were lost or not lost. That is the only issue.

Mr. Zinke: Your Honor, they bear upon the wilfulness of the defendant in this case.

Mr. Brunner: They have nothing to do with the question of whether or not the documents are in their possession or had or had not been delivered to the defendant.

The Court: It may show some reason for (27) wanting to conceal them and not produce them. It may also tend to establish whether the reason was valid or invalid. I will allow the question.

Mr. Zinke: Would you read that question, Mr. Cyrus?

(Question read)

A. Yes, I saw them at a later date.

Q. Do you know what quality goods were called for by those orders? A. Called for the various qualities that I had been given the samples of by Mr. Hecht, nylon, gabardines.

Q. What quality was called for by the orders? A. Called for so many yards of this quality and so many yards of this quality and so many yards of this quality.

Q. Was the quality called for the quality delivered to these customers? A. No, sir.

Q. What quality was delivered to the customers? A. Inferior quality.

Q. Inferior quality.

By the Court:

Q. Was that an invariable practice? A. Not completely, no.

(28)

Q. Was it sufficiently done to permit you to say whether it took place most of the time? A. Yes, sir.

Q. It did take place most of the time? A. Yes, sir.

Q. During what period of time are you testifying to? A. The period of June, 1956, sir; May and June, 1956.

Q. May and June of 1956, is that right? A. I think so.

Q. Who was in the office besides you and Mr. Hecht? A. Working for Mr. Hecht?

Q. Yes. A. I was the only one working for Mr. Hecht.

Q. So the World Over Corporation consisted of, so far as people were concerned, of Mr. Hecht and yourself? A. I was employed by Mr. Hecht.

Q. You were employed and he was the owner? A. Yes.

Q. There was nobody else? A. No, sir.

Q. How many rooms did you occupy? A. Two rooms, sir.

(29)

By Mr. Zinke:

Q. Let me ask you this, Mr. Cohn: The orders from the far eastern countries, Vietnam, call for a certain number of yards, is that correct? A. Yes, sir.

Q. Was the amount of yardage called for in the orders the amount of yardage delivered to these customers, shipped to these customers?

Mr. Brunner: Objection. There has been no showing that he would know of the entire transaction, your Honor. The question should deal with transactions that he personally dealt with. I submit that he cannot answer.

The Court: He can answer that if he knows the answer.

Q. if you know. A. It was not the same yardage shipped as the order called for.

Q. In what percentage of the orders did this occur? A. In most of the orders, I would say. I would say 85 or 90 per cent.

Q. Did you ever speak with Mr. Hecht about this? A. Yes, sir.

Q. Approximately when were these conversations with Mr. Hecht? (30) A. The orders, what they called for, and what Mr. Hecht purchased. Then I would show him the orders and Mr. Hecht told me then, showed me that each order had a little slip of paper attached to these orders which stated—I do not know the exact wording—that these were the orders from the customers, this is the order for this license number covered by the credit, the letter of credit number, and for you to invoice the full quantity and collect the full amount of the letter of credit and we will arrange any differences between ourselves.

Then Mr. Hecht told me that this is a part of it and "I have confidential correspondence of the customer at home and a lot of other things covering it."

Mr. Hecht told me also that this customer extracted from him a special discount of 3 per cent, so he would place his business with him. That is when he told me there is nothing wrong with this, that it is the arrangement of the customer that he has with him.

Q. Did you ever see any papers which would substantiate that arrangement? A. No, only for these little slips of papers that (31) were attached to the orders.

Q. Just for repetition, Mr. Cohn, is it common to have such a statement made in connection with orders between people, that the differences will be arranged? A. Not to my knowledge.

Q. Can you testify from your knowledge how large the differences were between the amount of yardage, the amount of goods ordered and the amount delivered on the various shipments? A. Well, it varied.

Q. Between where and where? A. A few where the difference, I would say, maybe was 20 or 30 per cent and others where the difference was 70 per cent, maybe.

Q. 70 per cent less than the amount ordered? A. Possibly.

Q. Mr. Cohn, these records you testified were placed by you in the files of the corporation, is that correct? A. Yes, sir.

Q. To your knowledge, how long did you continue working for the corporation? Until February of 1957? A. Yes, sir.

Q. To your knowledge, do you know of any occasion (32) where these papers were taken out of the files of the corporation? A. No, sir.

Q. Were you also working for the corporation, Mr. Cohn, during the time when there were orders received from customers in Cambodia for rubber tires? A. Yes, sir.

Q. Without going into the details, Mr. Cohn, was the same office procedure followed with regard to the purchase of rubber tires delivered to customers in Cambodia? A. Yes, sir.

Q. By that I mean purchase orders were retained in the files? A. Yes, sir.

Q. Invoices were retained in the files? A. Yes, sir.

Q. Cover letters were sent out with checks given in payment? A. Yes, sir.

Q. Packing lists were received by the corporation from Nu Mar? A. No, sir, not for rubber tires. They did not go to Nu Mar. They went directly to the piers.

(33)

Q. Do you know from which suppliers these rubber tires were purchased? A. Consolidated Rubber Company, Madison, Wisconsin.

Q. Yes? A. Boston Tire Exchange. Pollak Tires.

Q. Spell that. A. P-o-l-l-a-k, or "c-k" in Brooklyn.

Q. What type of tires, what quality of tires were purchased by World Over from these suppliers?

Mr. Brenner: I object to going into these issues as not being the issue before the Court at this time.

Mr. Zinke: I repeat, your Honor, that they bear upon the wilfulness of the defendant.

The Court: Overruled.

Q. Would you answer that question, please? What quality of tires were purchased? A. Recap tires.

Q. Recap tires. Of your own knowledge, Mr. Cohn, do you know what quality of tires were ordered by the customers in Cambodia? A. Tires were ordered.

Q. What quality? A. I do not know if the orders specified the (34) quality.

By the Court:

Q. Did they order or specify recaps? No, sir, not as far as I know.

Q. You saw no orders which called for recap tires? A. No, sir.

Q. You saw no orders which called for secondhand tires? A. No, sir.

By Mr. Zinke:

* * * *

(42) * * *

Q. Let me ask you just two more questions, Mr. Cohn. These records that I mentioned before, the purchase orders, the invoices, etc., were they all kept in the files of the corporation in the regular course of its business? A. Yes.

Q. Was it the regular course of business of the corporation to keep such files in connection with the purchases and related transactions? A. Yes, sir, as far as I know.

Q. So far as you know, Mr. Cohn, who was the owner of World Over? A. The owner I do not know. I know Mr. Hecht was the man who ran it.

* * * *

(61) * * *

JAMES T. MULROY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Zinke:

* * *

(64)

The Witness: I was seeking to determine the nature of the purchases by World Over Export Trade Corporation, which purchases of the World Over would have eventually found their way to a sales book and the merchandise would have found its way to the far eastern market of Vietnam and Cambodia.

I was attempting to follow the chain of goods from this country to the far east.

Q. In connection with your examination of the books and records of World Over, did you find that copies of purchase orders were retained in instances in the files of the corporation? A. I cannot say. I went through the books and records of the corporation looking for data in connection with the far eastern countries of Cambodia and Vietnam: purchase orders in connection with transactions to those countries I was looking for. I did not find any such purchase orders.

Q. Did you find any invoices covering purchases of textiles in this country in order to fill orders in Vietnam? A. I did not locate in the files of World Over any invoices from jobbers or suppliers in this country for textiles or rubber tires.

(65)

Q. Or rubber tires with regard to purchases from customers in Cambodia? A. Purchase in this country which would eventually finds its way to Cambodia.

Q. Did you find any papers in the files of the corporation in regard to these transactions? A. I did.

Q. What did you find? A. I found the correspondence files relating to negotiations with importers in Cambodia and Vietnam, general letters of correspondence.

I found copies of bills of lading for goods going to the far east. I found copies of invoices for goods going to the far east.

Q. From World Over to purchasers— A. From World Over to purchasers in Cambodia and Vietnam. I found copies of packing lists for textiles which were sent to Vietnam. I found copies of letters of credit with the Chase-Manhattan Bank. And I believe the Manufacturers Trust Company were in the textiles and rubber tires being shipped to Vietnam and Cambodia.

Q. Generally speaking, Mr. Mulroy, would you say that the files of the corporation were fairly (66) complete with regard to transactions between World Over and the customers in the far east? A. As far as the goods which found their way to the far east is concerned, I was unable to find any record relating to the purchase of those goods in this country anywhere, in fact. They showed them coming in to the books of the corporation, although there would have been data in connection with the sale of those goods to the far east.

Q. To repeat my question, would you say that generally speaking the files of the corporation were fairly complete with regard to the transactions between World Over and the customers abroad? A. To that question, on the surface it appeared to be complete, but on occasion, in reviewing these files, I do see where there are copies of letters missing.

For instance, a foreign importer writing a letter to

World Over referring to "our letter of such-and-such a date," and that particular letter might not be found in the file. The same way with World Over to a foreign importer, "referring to our previous letter of a particular date;" on a few occasions those types of letters of reference were (67) missing, but generally speaking they were filed complete.

Q. Did you find any papers in the files of World Over with regard to transactions between the corporation and suppliers in this country? A. Yes. I found there were invoices for typewriter repairs and things of that nature, purchases of paper, invoices of that nature were in the files.

Q. How about papers with regard to transactions between World Over and suppliers in this country of textiles and rubber tires? A. I was unable to locate any such papers.

Q. Any papers? Purchase orders? A. I was unable to locate, for instance—I worked from the book of World Over, the cash disbursements book.

The checks issued by World Over are listed chronologically and there is a total column indicating the amount of the check. It is then broken down to what the particular check was for. For instance, the purchases of goods in the column in the book, and it was items of that nature that I was interested in, the purchase of goods and textiles and rubber tires, and those rubber tires would be indicated.

There is another column here for general items, (68) miscellaneous, where you might find office expenditures on typewriter service, and things of that nature?

First, the checks were all mixed up. I put about 100 of the checks in order and then I went through the checks

chronologically and found that certain checks were missing.

Q. Which checks were those? A. The checks that were missing are the canceled checks of particular items purchased.

Q. Which items purchased? A. The items which would be indicated in this book in the purchase column, which would reflect the purchase of rubber tires and textiles. For instance, they were the only checks that were missing of these 100 that I put in order.

Q. All the other checks were there? A. All the other checks were there in chronological order, rather than waste my time putting all these checks in order, then looked up the names of the supplier.

Q. Did you find the names of those? A. Yes, they are listed there in the book. I went through the balance of the checks to see if I could find the canceled checks indicated by the cash (69) disbursement book, in order to start this rolling. I was unable to locate any of the canceled checks for this particular purchase of goods. I was unable to locate the invoices covering these items which were indicated as paid. I was unable to locate any order for these goods; unable to locate any letter of transmittal which might accompany the check of the particular vendor.

I noticed that there was a packer employed or used by World Over. I was unable to locate any instructions of World Over to the packer as to how the goods should be packed and shipped.

After spending three days looking through all of the files that were in the two offices and actually handling all of the folders in these file cabinets, and with Mr. Hecht going through the drawers, the desk drawers, I was unable

to find anything relating to these items that I have just mentioned.

I spoke to Mr. Hecht about it. He was at a loss as to why these documents should be missing. In fact, he went through the cabinets himself trying to find these documents for me. He was at a loss as to an explanation. He pointed out to me that in some instances the charwoman may have come around and actually thrown records away.

(70)

Q. Mr. Mulroy, you found, just to recapitulate, you found no records of the corporation with regard to purchases by it from suppliers in this country in order to fill purchase orders from far eastern countries? A. That is right.

Mr. Zinke: No further questions.

Cross examination by Mr. Brunner:

* * * *

(71) * * *

Q. Is it fair to say, Mr. Mulroy, that the documents were never refused to you but it was that you were never able to get together or the parties never got together with you in order to give you those documents? A. Both Mr. Hecht and his attorney put me off and kept on promising the documents, although they never——

Q. You did have several meetings with Mr. Hecht and with myself as his attorney at which we produced certain documents, such as letters of credit and some supporting documents and in fact went over those in your office for quite a time there trying to straighten them out, is that

correct? A. Again those are the same records that pertain to dealings on the goods from the time they left this country and went overseas to Vietnam and Cambodia, Those were the same records that were exhibited.

* * * *

(73) * * *

Q. There were also papers in packages which were lying on the floor and on shelves at the time you were there? A. There was paper.

Q. You mean blank paper? A. I am just saying paper. There was advertising material in the magazines and types of paper of that nature left on the floor.

Q. Were there also bundles of paper of various descriptions? A. Groups of paper I would consider as a bundle. Groups of magazines may have been tied together with a piece of string. I would consider that a bundle.

Q. When you say magazines, is it fair to state that these were not fictional magazines but magazines dealing with the trade of these corporations? A. That is correct.

(74)

Q And after spending about three days there you took away approximately a little over 700 documents, is that correct? A. After spending three days there, I got together the only papers that I could find dealing with transactions in Cambodia and Vietnam, which documents were of interest to me from my investigation and which I would want to examine very, very closely; rather than to take up space in an office there with two desks, I received permission from Mr. Hecht and yourself to remove those documents and examine them at my leisure, and in return I gave a receipt. I explained to you and Mr. Hecht at the time that these were merely documents relating

to correspondence with these people in Vietnam and Cambodia.

Q. Now, Mr. Mulroy, many of these documents that are open to you and which you picked up were documents, which you now have in your lap, disclosed the names of suppliers and packers, and so forth, isn't that correct? A. Where a check was made out to a particular person—I never saw the canceled check.

Q. I appreciate that. My question to you is whether the names of these suppliers who would have (75) received the canceled checks were found by you in documents which you picked up at this office, is that correct? A. The only evidence I have of any suppliers named or anything relating to a supplier is from an indication in this book that, for instance, check No. 143 was issued to John Doe, Inc., for example. That was the only indication of any supplier at all that I came across.

Q. And also that same book, which is a large ledger book, contained the name of the packer to whom you previously referred as being a packer to whom these shipments were delivered for packing, is that correct? A. There was a name of a packer indicated in this book.

Q. That information was obtained by you or was disclosed to you from the ledger book which you picked up at the office of World Over Export Trade Corporation? A. That is correct.

Mr. Brunner: Thank you, Mr. Mulroy.

Re-direct examination by Mr. Zinke:

Q. Mr. Mulroy, you testified that there were magazines and papers on the floor of the corporation in bundles, the corporation office. Did you observe any books or cor-

porate records of the corporation? (76) A. There were no records of the corporation as such, no invoices or anything of that nature.

Q. They were in the files of the corporation? A. Yes, invoices were in the files of the corporation in cabinets.

Q. And other important papers? A. Important papers were found in the file cabinets. They were not lying on the floor.

Q. Was it readily observable by you from your examination of that corporate record book which you have in your possession on the stand what purchases were made by the corporation from suppliers in the United States of textiles and rubber tires? A. I have no indication as to the name of the person or corporation to whom a check was issued.

Q. No idea for what purpose the check was issued? A. No idea of the purpose, no idea of where the firm is located, or the corporation, whether in Brooklyn or in Seattle, Washington.

Q. It could be anywhere in the United States? A. It could be anywhere in the United States, to find out who John Doe, Inc. might be.

* * * * *

(79) * * *

The Court: Does the defendant wish to submit any proof?

Mr. Brunner: No, if your Honor please. The defendant has no witness or proof to submit. I would, however, make a final statement to your Honor on behalf of the defendant bearing both upon Judge Walsh's direction and upon the testimony adduced here this afternoon.

Statements of Judge Palmieri and Counsel

(80) * * *

The Court: You see, it stretches the credulity of the Court for him to claim that every single document pertaining to this one phase of his business is missing. At least one of them should have been found. But the charwoman was apparently very familiar with his files and exercised extraordinary skill in being able to cull out of his (81) files all the papers relating to the suppliers in this country. So it is obvious to me that those files were cleaned out with the purpose and skill; for him to claim to me to believe that the charwoman did it is just a little bit too much. I haven't deposited my common sense in the robing room before coming into court. Don't you see how convenient it could be for a man running a one-man corperation in two rooms like this man was operating to be able to avoid prosecution and investigation of his corporation just by saying, "Well, I gave you everything I had. I am terribly sorry. I will search for the next six months, but I haven't got them."

Then he is free. You don't claim that——

* * *

(94) * * *

The Court: You have been given now a very thorough and formal accounting of your client's conduct. You have been given the opportunity to submit evidence. How do you excuse his conduct? Are you—you have declined both opportunities. The issue before me is a very clear issue as to whether or not his conduct up to this point has been proven to (95) be contemptuous within the purport of the law applicable thereto.

Finding of Contempt

(98) * * *

The Court: Gentlemen, it is my conclusion that a sufficient case has been made out to justify my finding that the defendant intentionally and without adequate excuse defied the processes of this court and has failed to comply with a subpoena duces tecum. His conduct is contemptuous and contumacious. He has persisted in that conduct despite several opportunities to comply with the subpoena, despite clear instructions of the Judge of this Court with regard to his obligations as a witness, pursuant to the direction of that subpoena.

Therefore, I adjudge the defendant in contempt upon the record before me.

I consider now an application to punish him for that contempt. I would like to confer with counsel off the record.

(Discussion at the bench between Court and counsel, off the record.)

The Court: Stand up, Mr. Hecht.

I sentence you to serve a term of three (99) months in jail for contempt of court, upon the stipulation that if at any time you comply substantially with the obligations of the subpoena duces tecum, which up to this time you have failed to comply with, you may be purged of contempt upon the proper showing before a judge of this court that you have so complied.

I direct that you surrender at 4 o'clock tomorrow afternoon and that in the meantime you give bail in the sum of $5,000 for your appearance.

* * * *

Statements of Judge Palmieri and Counsel on June 5, 1957

(106) * * *

(111)

The Court: I specifically asked that question of the FBI agent because I was concerned about the possibility that these might have been very old records that in the normal course of business would be discarded, but they weren't.

Mr. Merritt: This goes back over a year.

The Court: These records were asked by the FBI agent, as I recall, in March 1946, and they are related to transactions which were from March 1956 onward, which meant that they were a year or less old at the time they were requested.

Am I right, Mr. Zinke?

Mr. Zinke: They relate to transactions from June on, not from March.

The Court: June '56 on.

Mr. Zinke: Yes.

The Court: So there was not one item as much as a year old.

Mr. Zinke: Quite correct, your Honor.

The Court: So you see he is not being asked to produce records which in the normal course of events would have been discarded. They are recent records.

Mr. Merritt: But he explained before earlier (112) in the proceedings that he had moved several times and that although this might look like a large business, it is a one-man operation. On these import and export transactions large quantities take place but it is work out of a small office right here at Broadway and he is the lone employee and operator of his business and on occasion he has had [illegible] time to time.

Statements of Judge Palmieri and Counsel on June 5, 1957

The Court: That is all the more reason why he should know what happened to these documents.

Mr. Merritt: Unfortunately, some of them may have been mislaid. Some of them may have been thrown out.

The Court: But at least a few of them, by accident, should have remained. Here there was a very complete and skillful cleanout of everything that related to the very thing which was being investigated by the FBI.

Mr. Merritt: That is not so. They had 700 documents in relation to this investigation.

The Court: Not one of which relates to business transactions between this man and his suppliers in the United States.

Mr. Merritt: I do not know that. They (113) have taken those records and we do not know what they have.

The Court: You know what they have. That is another statement that is not justified. I am not inclined to hear you further because it is obvious you do not know what happened in this case yesterday and I demand that the defendant's counsel stand up and correct me if I am wrong.

Yesterday the United States Attorney represented that all of the documents which he had from Mr. Hecht were available and had remained available to Mr. Hecht's lawyer throughout. And he turned over to him in my presence an envelope containing those documents and said that they could be inspected right then and there, because counsel said he was looking for a paper, and then he declined to go further into the matter.

Mr. Brunner, have you had a chance to look at the documents?

Mr. Brunner: We do not deny that we had access to them, nor that we could at any time have examined them. The documents were in the physical possession of the United Attorney.

However, we did concede, I agree with your Honor fully, that because we did concede with Mr.
(114) Mulroy that Mr. Mulroy told us that these documents which he was seeking were not among those papers, and that I would not have to seek further but would accept Mr. Mulroy's word. Mr. Mulroy said that that is true.

I fully agree with your Honor that we do not contend that these missing documents are in the possession of the Government. We admit that the documents which your Honor mentioned are documents which are missing and are not in the possession of the Government.

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(116) * * *

STANLEY S. HECHT, called as a witness in his own behalf, having been first duly sworn, testified as follows:

* * * *

(126) * * *

Cross examination by Mr. Zinke:

* * * *

(133) * * *

Q. Is it your testimony today that some of these papers were just left lying around on the floor and on the desk?

A. No, sir. I said here when we—they send us a check to make payments the usual way. We send also (134) a letter to the supplier, "Enclosed find check No. so-and-so in payment of your invoice."

The invoice, usually months and months, is left in his desk accumulating a lot of papers, bundles of papers, I beg your pardon. I give you 20 witnesses, and I reserve the right to do so.

When the man come in in mine office the first time he told me he will clean up this mess first, and after he worked for me, a bigger mess I had on my desk, so big (indicating) piles on his own desk, so we never could find a letter or an invoice.

Q. Mr. Hecht, I would like to repeat my question. Did you hear Mr. Cohn testify yesterday that the purchase orders and the copies of covering letters and the invoices were filed in a filing cabinet? A. No, sir, letters——

Q. Does that refresh your recollection as to what was done with these papers? A. Yes. He said that. He put it in the files; that's correct. Certain documents he put in. A few he put in. Others he left it in his desk, plenty.

Q. He put some in the files? A. Yes, yes, and you can find it there.

Q. Do you know of any case where the accountants—(135) you say they took invoices and canceled checks—took them out of the office? Is that what you said before? A. No. The accountant came here once in a month or sometimes twice a month and he have to make the proper entries in the books, so he asked me in December, on different occasions—this never happened before—is missing a few invoices and he want to have the invoices to make the proper entries. "Where are the suppliers? How much we paid out? How much we collect?" and so on.

We have to keep in according with this system, proper books.

Q. In other words, the accountants did not take any papers out of your office, is that correct? A. This accountant, not. The previous accountant took out 20, the checks and the books, to his home.

Q. Then there were some accountants who did take books and records out of the corporation. A. No, only checks and books.

Q. Checks and books? A. Yes.

Q. They wouldn't have taken purchase orders, for example? A. No, sir.

(136)

Q. They wouldn't have taken invoices? A. Checks and books.

Q. They wouldn't have taken purchase orders? A. No.

Q. Checks and books. A. Previous, they are doing homework, accountants, part-time accountants.

The Court: Those were canceled checks and books.

The Witness: Yes, but the bundles, he took checks, and that I was amazed.

Q. Isn't it a fact, Mr. Hecht, that none of the important papers of the office were kept on the floor of the office? Isn't that a fact? A. Well, it is not important. I am receiving daily an average of between 40 and 60 foreign, international letters, correspondence from Europe and all parts. Until I am through with the correspondence in the afternoon, and until I am going through with the invoices and the payments—I am a one-man office and I cannot depend on the clerks and on nobody else—so usually I

leave there the papers with the purpose to file it in the proper place.

I had a good system in the past, an excellent (137) system on my fingertips. I could find everything, the cardex and the correspondence, but lately—I admit that—I had not since one year or 15 months a proper system, and I am ashamed to admit it.

Q. Let me ask you this: You wouldn't suggest that any of the invoices were just thrown on the floor of your office, would you? A. No, not purposely because I need these invoices to buy tomorrow merchandise from the same suppliers and to buy next year because certain suppliers give me an excellent service and special price, so I need these invoices for later purchases.

Q. You wouldn't suggest that the purchase orders were just thrown on the floor of the office, would you? A. No, I don't throw it. I don't use these to throw around. Nothing is thrown around. Just to organize it properly, I have it on one side and I put it on another side and Mr. Cohn put it in the bundles and that is the end of it.

Q. And you wouldn't suggest that the copies of covering letters to U. S. suppliers were just tossed on the floor of the office, would you? A. No, I don't say that also. When he made out a check, automatically he put in a copy of the letters (138) and put it in the file because he had the file in the back of him, of his chair.

Q. These were papers that went in the file, is that right? A. Yes.

Q. Therefore these are not the papers that would have been thrown out by the charwoman, is that correct? A. I went through the papers with the FBI. You have only one dozen, but I am missing there at least 150 more papers.

I mean, you are speaking from the copies of the check, copies.

Q. Let me ask you this to sum all this up: You heard Mr. Mulroy, the FBI agent, testify yesterday— A. Yes.

Q. —that he could find no papers in your files relating to purchases from suppliers in the United States of goods, specifically of textiles and rubber tires, to be shipped to customers of World Over in Vietnam and Cambodia, respectively. How do you account for that? A. May I call your attention, sir, that he doesn't find invoices from South Africa, he don't find invoices from European countries where we send merchandise. I need these invoices also to pay (139) commissions to these agents. I beg your pardon, sir. You asked me one question from Saigon and Cambodia. We are missing more invoices from other countries also.

Q. How do you account for the fact that all of these papers are missing, Mr. Hecht, but all of the papers, or generally speaking, the papers relating to the transactions between World Over and the far eastern customers are in your files? A. No, sir. The invoices I am missing—I repeat again. There are missing the invoices also in the office, invoices in relation with dealing in other countries.

The Court: Yes, but you are not answering the question, Mr. Hecht. The question is: You admit that those invoices and papers are missing. You say that additional papers are missing. But, regardless of whether additional papers are missing, how do you account for the fact that the Cambodia and Vietnam papers are missing?

The Witness: As I said, your Honor, before, he had it all by bundles on his desk, all the correspond-

Stanley S. Hecht—Defendant—By the Court

ence, separate invoices in bundles, and I just had not a chance all the months to go through in details. I have been too busy with going out in (140) the market to purchase goods, take care of the telephone, take care of details; I am traveling a lot——

The Court: In other words, you cannot explain it.

The Witness: No, sir.

The Court: Because you have been too busy.

The Witness: Yes, sir, and he had it in his desk all the time.

The Court: By "he" you mean Mr. Cohn?

The Witness: Yes, your Honor.

Q. And you really haven't any excuse? A. I beg your pardon?

Q. You really haven't any excuse, any reason why all these papers are missing. A. I do have an excuse, because this can happen—of course, it is not supposed to happen, but this could happen. It could happen that a file is getting lost or papers getting lost, not purposely. It is not necessarily to be purposely, but it is just a lack of organization.

Q. It could happen that all of the invoices— A. Of a system.

Q. —all of the purchase orders, all of the canceled checks, all of the covering letters, all of the packing lists you received from Nu Mar, all of (141) them were missing? That could happen? A. No. I am a plain businessman and I am 27 years in business. I know what you asked me very good, but you should restrict yourself, Mr. District Attorney, to the one situation. This is not all. It is not here all.

I don't know at this very moment what checks are missing myself. I don't know what correspondence I am missing. I have not an interest to be missing nothing. I have nothing to hide, in the first place.

Q. Did you know at the time you were served with this subpoena that you were under investigation for alleged violations involving ICA transactions? A. Yes, I do.

Q. You did know that? A. I know, yes.

Q. Did you hear Mr. Mulroy testify yesterday that he put your checks in chronological order, the canceled checks in your files? A. Yes.

Q. And that the only ones missing were those relating to purchases of World Over from suppliers in the United States? A. Yes.

(142)

Q. How do you account for that? A. But Mr. Mulroy don't told you a very important fact, that he found in different files different checks, more checks, not organized properly, in the proper place.

The Court: What you are saying, in effect, is that a great many more documents than these are missing.

The Witness: Yes.

The Court: And you don't know how it happened.

The Witness: Yes.

The Court: Except that you were not there most of the time and you were not well organized.

The Witness: Yes, it is true.

The Court: Although you admit that some of these papers that Mr. Zinke is questioning you about were filed in the filing cabinets. You admit that?

Stanley S. Hecht—Defendant—By the Court

The Witness: Yes, your Honor, indeed.

The Court: But you don't know how they got out of the filing cabinets?

The Witness: Because mostly Mr. Cohn keeped a lot of bundles of papers on his desk so big (indicating). I can give you a dozen witnesses in this respect.

(143)

The Court: He kept them on his desk but you don't know how they disappeared from his desk?

The Witness: I don't know, no, sir. It is not supposed to be disappeared.

The Court: You don't claim Mr. Cohn stole the papers, do you?

The Witness: No.

The Court: Or that he threw them away?

The Witness: No, he had not a good system.

The Court: All you say is that Cohn was a little bit slipshod or clumsy.

The Witness: Plenty.

The Court: And left papers on his desk that he should have put in the filing cabinet.

The Witness: I can mention you witnesses that worked with me in my office that he has a very bad system—I am sorry to admit that—and I myself left sometimes papers on the desk or on the floor for the purpose of organizing them properly, alphabetically.

The Court: Are you finished?

Mr. Zinke: No further questions, your Honor. I think it is patently clear.

Mr. Brunner: No further questions.

* * * *

Statements of Judge Palmieri and Counsel at Re-Hearing

(144)

The Court: I adhere to the decision I reached yesterday, and I am filing this order in the terms which I have already read, and I adhere to the imposition of the same sentence with the same purging clause.

• • • •

Mr. Zinke: I was about to add, your Honor, that if Mr. Hecht would furnish me with the names of his accountants, I will be glad to have the FBI (145) immediately contact them and see what substance there is to the statements which Mr. Hecht has made.

The Witness: The name is Mr. Voker. You have him in the checkbook.

The Court: I will give you an opportunity to confer with your lawyers and with Mr. Zinke so that he can take down the names and addresses of these people to see whether there is any basis for it.

But my own view is that it is incredible that so many business records could have just disappeared in the manner this witness claims. I cannot credit his story.

• • • •

FILED
DEC 23 1957

No. 381 ; *To be argued by*
WILLIAM MERRITT

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

STANLEY S. HECHT,
Defendant-Appellant.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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SUPREME COURT U.S.
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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STANLEY S. HECHT,

Defendant-Appellant.

APPELLANT'S BRIEF

Statement

This is an appeal from a final judgment finding the defendant guilty of a criminal contempt of court, and the order of commitment entered thereon (3a), after a trial without a jury before Hon. Edmund L. Palmieri, *D. J.*, on June 4, 1957, pursuant to the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure. The defendant was sentenced to serve a jail term of ninety days, with leave to purge himself of said contempt at any time.

On June 5, 1957 the defendant sought to purge himself of the finding of contempt and after a hearing, the Court adhered to its original decision.

The defendant filed a notice of appeal to the United States Court of Appeals for the Second Circuit and bail in the sum of Five Thousand ($5,000) Dollars was set pending that appeal.

Questions Presented

1. Did the government sustain the burden of proving the defendant guilty of a criminal contempt of court beyond a reasonable doubt?

2. Did the trial court err in finding that the defendant had failed to purge himself of the alleged contempt?

Argument

The government was investigating certain transactions between World Over Trade Export Corporation and merchants in the United States, through whom merchandise had been purchased for shipment to Cambodia and Vietnam, under the International Cooperation Administration program (6a, 12a, 13a). The defendant as President of World Over Trade Export Corporation, was served with a subpoena duces tecum on March 27, 1957. Said subpoena required that the defendant produce all the books and records of said corporation, including correspondence, quotations, invoices, freight bills, export and import licenses, bills of lading or receipts, bank statements, checks, letters of credit, corporate tax returns for 1956 and all other data relating to the operation of said corporation for the calendar years 1956 and 1957 (6a).

Pursuant to said subpoena the defendant appeared at the office of the United States Attorney and in view of the huge volume of files involved, it was agreed that an agent of the Federal Bureau of Investigation would go to the office of the corporation and examine the files and records of the corporation with full leave and authority to go through the records as the agent saw fit (17a). In accordance with said agreement, Agent Mulroy, of the Federal Bureau of Investigation, appeared at the office of the corporation on April 1, 1957 (12a), and spent three days

looking through the office, file cabinets and desk drawers with the assistance of the defendant. Some cancelled checks, invoices and purchase orders could not be found that dealt with the transactions under investigation (15a-16a). At the conclusion of this three day examination, Agent Mulroy, with the consent of the defendant, removed to the offices of the United States Attorney, approximately seven hundred (700) documents, in connection with the investigation (17a).

Thereafter, on May 15, 1957, the defendant appeared before the Grand Jury. After refusing to answer certain questions concerning the books and records of the corporation, defendant was directed by the Court to answer questions of a general nature relating to the books and records of the corporation, and to produce the records which Agent Mulroy could not locate (7a). The defendant again appeared before the Grand Jury on May 17, 1957 and after refusing to answer certain questions he was given the same directions by the Court as on the prior occasion. Defendant re-appeared before the Grand Jury on May 28, 1957 and on that occasion he did answer questions of a general nature relating to the books and records of the corporation and the general manner in which they were kept (8a), but defendant could not find and produce the missing records.

On June 3, 1957, the defendant was brought before the Court by the United States Attorney to stand trial for criminal contempt of the Court, for failure to produce the missing records. The defendant waived the notice required by Rule 42 of the Federal Rules of Criminal Procedure and trial was set for June 4, 1957 (5a).

In an attempt to establish that the missing records were in existence on March 27, 1957, the day when the subpoena duces tecum was served (6a) the government produced as a witness, Sigmund Cohen, a former employee of the cor-

poration. Cohen testified that he had worked for the corporation from March, 1956 to February, 1957 (8a). The last time Cohen had occasion to see or look at any of the documents in question was in July, 1956, eight months before he left defendant's employ and nine months prior to the service of the subpoena duces tecum (11a).

In an attempt to prove motive and willfulness on the part of the defendant to conceal the missing records, the government tried to prove through Cohen that inferior grades of merchandise were purchased for the Vietnam and Cambodia transactions (9a). However, Cohen testified that orders for tires called for reconditioned tires and not new tires; and that to his knowledge all shipments had been completed except one (10a), and that he did not know whether the defendant had completed shipment of the textiles involved in the investigation (11a). He further stated that from the samples of textiles received from the customers and given to him by the defendant, he could not tell whether these samples called for first, second, third or fourth quality textiles, but that he had purchased second quality textiles for shipment to Vietnam and Cambodia (11a-12a). He further testified that the purchase orders he prepared were prepared in triplicate, one of which was kept for the corporation files, and two were sent to the suppliers. The suppliers returned one copy with an acceptance of the order thereon (8a). Cohen also testified that the bookkeeping of the corporation was done by accountants who came in every four or five weeks, but he did not know who prepared the papers for the accountants (10a).

Agent Mulroy testified and stated that he had found correspondence, bills of lading, copies of invoices, packing lists, correspondence with banks as to letters of credit, and books of account showing the purchase of materials to be sent to Vietnam and Cambodia. The files seemed to be complete, although there were some letters that would ap-

pear to be missing (13a-14a). Although Agent Mulroy could not find certain cancelled checks and purchase orders for the Vietnam and Cambodia transactions, he did find recorded in the books of account of the corporation, records of and the numbers of the missing checks and the names of the merchants who filled the purchase orders of the corporation (15a, 18a). However, after seeing that the names of the merchants were in the corporate records, Agent Mulroy did not ask the defendant for the addresses or for any further information concerning these merchants (18a). The defendant assisted Agent Mulroy but they were unable to find the missing papers, and the defendant was at a loss to explain their disappearance and pointed out that in some instances a charwoman may have thrown them out (16a).

Agent Mulroy stated that although he had spent three days in the offices of the corporation he did not know whether copies of purchase orders were generally kept in the files of the corporation since he had confined his investigations solely to the records and files dealing with the Vietnam and Cambodia transactions (13a).

On this testimony the government rested its case, at which point the defendant also rested. The Court determined that a *prima facie* case had been made out (18a) and adjudged the defendant to be guilty of contempt, and sentenced the defendant to serve a term of three months in jail with the right to purge himself of said contempt, at any time (22a).

In an effort to purge himself of the finding of contempt the defendant appeared before the Court on June 5, 1957, and testified under oath that during the year prior to the service of the subpoena duces tecum he had employed approximately six different accountants (23a) and that in December or January he and the witness Cohen had looked for some of the records in question but could not find them (24a). On several occasions some papers had been thrown out by the cleaning woman, of which defendant had complained to the building superintendent (24a).

Defendant further testified that he had never personally destroyed any of the documents in question and that he did not have any of them in his possession or control (24a-25a). The last time defendant saw the documents in question was in December or January, when he was asked for them by his accountant in order to have proper entries recorded in the books of the corporation (24a). He further testified that in addition to the missing documents in question, many others were missing (25a-26a).

At the conclusion of the defendant's testimony and without testimony to contradict the defendant, the Court adhered to its original decision although it had some apparent doubt in its mind (26a).

POINT 1

The government failed to prove the defendant guilty of a criminal contempt of court beyond a reasonable doubt.

In a prosecution for a criminal contempt of court, the burden is upon the prosecution to establish beyond a reasonable doubt, the guilt of the accused. The burden is not upon the contemnor to exonerate himself (*Western Fruit Growers, Inc.* v. *Gotfried*, 136 F. (2d) 98; *Russell* v. *United States*, 86 F. (2d) 389; *United States ex rel. Porter* v. *Krogg Grocery and Baking Co.*, 163 F. (2d) 168; *Blip* v. *United States*, 68 F. (2d) 484).

The courts have stated that every element of the offense of criminal contempt, including criminal intent, must be proved by sufficient evidence beyond a reasonable doubt, otherwise the defendant is entitled to an acquittal (*United States* v. *Jose*, 63 F. 951; *United States* v. *Unicis Lens Co.*, 88 F. Supp. 809; *United States* v. *Dackis*, 36 F. (2d) 601; *United States* v. *P. & W. Contracting Co.*, 52 F. Supp. 792).

As the Court stated in *United States v. Univis Lens Co., supra*, at page 816:

> "* * * In the matter of intent that too is an essential element of a criminal contempt and must be established beyond a reasonable doubt, United States v. Kroger Grocery & Baking Co., 7 Cir. 163 F. 2d 168; * * *."

The defendant in a criminal contempt proceeding can legally be jailed for failure to produce requested books only when they are fairly shown to be presently within the defendant's power and control. However, merely showing that the books and records once existed, does not in and of itself prove their present existence.

This Court, in the case of *United States v. Patterson*, 219 F. (2d) 659, 661, stated:

> "As the Supreme Court said in Maggio v. Zeitz, 333 U. S. 56, 65, 68 S. Ct. 401, 406, 92 L. Ed. 476: 'Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason. Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a "presumption of fact", is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.' The presumption is thus no more than a common-sense inference, as strong or as weak as the nature of the surrounding circumstances permits. Brune v. Fraidin, 4 Cir. 149 F. 2d 325; * * *."

In the instant case the government has fallen far short of the necessary quantum of proof necessary to convict the defendant of a criminal contempt of court. In

this investigation, the government sought information in connection with several transactions of the corporation that involved the International Cooperation Administration. Some records of the corporation, principally purchase orders, invoices and cancelled checks could not be found by the agent of the Federal Bureau of Investigation of the defendant, although approximately seven hundred (700) other documents in connection with these transactions were turned over to the government in response to the subpoena duces tecum (17a).

Despite the absence of the records in question, the records and books of account of the corporation, turned over to the government, did have recorded in them the check numbers of the missing checks with the names of the merchants to whom they were issued and the amounts of money paid (15a, 17a).

No criminal purpose or intent could possibly be served by wilfully concealing or destroying these disputed documents, if they were in fact in existence, while at the same time the defendant turned over to the government corporate records disclosing the very facts which the government would have the Court believe the defendant was concealing. Microfilm copies of the cancelled checks are available from the bank where the corporate account is kept. The original purchase orders and copies of invoices are available from the suppliers (8a-9a). However, neither the Agent of the Federal Bureau of Investigation nor the United States Attorney requested the defendant to supply these copies or the addresses of the merchants who had the original purchase orders and copies of invoices, nor the microfilmed copies of the cancelled checks. The government has insisted upon the production of these items from the files of the corporation which apparently were lost, misplaced or thrown out (16a).

As a matter of fact, when Agent Mulroy had obtained the names of the merchants from the corporate records,

he did not ask the defendant for the addresses or any information concerning these merchants. He did not take these matters up with the defendant at all (18a). Despite this, the United States Attorney took great pains to point out to the trial court that although Agent Mulroy had the names of the merchants, he did not know where the merchants were located (21a-22a). It is obvious that had Agent Mulroy, or the United States Attorney, asked for the addresses of these suppliers, there would be no difficulty in locating them. The fault, if any, lies with the government in failing to ask for the information and does not lie with the defendant.

In an attempt to prove the existence of the missing documents at the time of the service of the subpoena duces tecum, the government tried to show motive for concealment or destruction of the documents. An attempt was made to prove that the defendant shipped second quality goods, rather than first quality. In this endeavor, the government again failed.

The witness, Cohen admitted not having seen the records in question since July of 1956, nine months prior to the service of the subpoena, and also admitted that he did not know what quality merchandise was called for in the transactions in question. He did recall that the orders for tires called for reconditioned and not new tires (10a). He did not know what quality textiles were called for by the orders and could not tell from the samples that had been received from the customers (11a-12a).

Assuredly, this testimony could not and does not substantiate the government's theory of motive for concealment of the missing records, nor can this testimony prove the existence of the documents in question on March 27, 1957, nine months after the witness last saw them.

On the contrary, the turning over of the records of the corporation which disclosed everything that the govern-

ment would have the Court believe the defendant was concealing completely negates any theory of motive on the defendant's part.

As the Court stated in *Blim v. United States*, 68 F. (2d) 484, 487:

> "What this Court said in Jones v. United States, 209 F. 585, 587, is especially applicable to the case at bar. 'Under the authorities, the present contempt proceeding having been entitled as such and brought here on writ of error and being entirely punitive in its character, is criminal in nature, and respondent was clothed with the presumptions that obtain in a criminal prosecution. He was presumed innocent until that presumption was overcome and his guilt established beyond a reasonable doubt. Gompers v. Buck's Stove & Range Co., 221 U. S. 418 * * *.'"

The Court below stated that in its opinion a *prima facie* case had been made out and the Court apparently felt that inasmuch as the defendant did not take the witness stand (18a) it was justified in finding the defendant was guilty of contempt. (22a).

The mere making out of a *prima facie* case, in and of itself, can not sustain a finding of guilt in a criminal proceeding. The evidence must be sufficient to prove the defendant guilty beyond a reasonable doubt, and this burden remains on the prosecution at all times.

As this Court stated, in *United States v. Patterson*, *supra*, at page 661:

> "The decision below thus rested primarily on a presumption of continued possession and existence held sufficient to constitute a prima facie case. Neither the existing precedents nor the facts of this case warrant such a drastic shifting of the burden of proof in a criminal case * * *."

POINT II

Defendant purged himself of the alleged contempt.

After the Court below found the defendant guilty of a criminal contempt and had passed sentence, the defendant made an effort to purge himself of the finding of contempt, by testifying under oath the following day. At the conclusion of the hearing the Court adhered to its original decision, with the continued right of the defendant to purge himself of the finding of contempt (26a). The Court evidently had some doubt in its mind concerning the propriety of its decision, stating at page 144 of the minutes of the hearing (26a):

> "However, in order to be completely fair to this man, and in order to relieve myself of any possible—even remote and most unreasonable—doubt, I want to be sure that we are being completely fair, and I would appreciate it, Mr. Zinke, if you would ask the FBI agent if he could please interview the superintendent of this building and the charwoman to find out whether there is any basis whatever to this witness's claim that his business documents apparently disappeared from his office, and that he complained about it on a number of occasions, because, if there is any basis for such a claim, I would like to have the charwoman and the superintendent examined and I think you should ask them to communicate with the accountant who worked for his business, as well."

It is apparent from the Court's statement that it felt the defendant had not told the truth and that was the basis of its decision. Yet, the Court apparently had some doubt in its mind.

In the case of *Ex Parte Hudgings*, 249 U. S. 378, the Supreme Court in discussing the power of a court to punish a witness for a criminal contempt, who it believed to have committed perjury, stated at pages 383 and 384:

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see United States v. Appel, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

Also, in the case of *Blim* v. *United States*, 68 F. 2d 484, at page 489, after discussing the *Hudgings* decision, stated:

"In the Blim case the court sentenced the respondent to the County jail for a period of three months, with the privilege of purging himself of said contempt within ten days by fully, freely and truthfully testifying. The sentence in the Blim case is not exactly like the sentence in the Hudgings case, as Blim is given a definite sentence, with the privilege of purging himself within ten days by testifying truthfully, according to the court's conception of the truth."

It is quite apparent that the Court below did exactly what the Supreme Court condemned in the *Hudgings* case, it determined what it thought the truth should be. Until such time as the defendant would admit to the Court's version (26a) rather than what the defendant maintained was the truth, he would be unable to purge himself of the contempt. This despite the fact that no evidence contrary to the defendant's version had been adduced.

The Court refused to accept the defendant's version (27a), that he was at a loss to explain the disappearance of the records and that he had nothing to do with their disappearance. This despite the fact that no evidence was introduced to the contrary, either at the trial or at the hearing. Defendant gave the same testimony to the Grand Jury and neither the Federal Bureau of Investigation nor the United States Attorney had adduced any proof before the Grand Jury or the Court to dispute the defendant. The Court based its decision on a presumption that the records having been in existence in July, 1956, were presumed to be in existence on March 27, 1957. The Supreme Court in *Maggio* v. *Zeitz*, *supra*, and this Court in *United States* v. *Patterson*, *supra*, condemned that reasoning.

Again, at the risk of being repetitious, it must be pointed out that defendant in turning over the records and books of the corporation, which contained the records of his dealings with the merchants, their names and the amounts paid to them, had destroyed any value that concealment of the missing records could have been to the defendant. Had the defendant been intent on concealing his activities in the transactions in question, he most certainly would have destroyed or concealed all of his records and not turned over the books that revealed all.

The fact remains that each of the documents in dispute can be duplicated from impartial sources, i.e., the merchants and the bank. The records produced by the defend-

ant made the location of these records possible. The government can obtain these records without any great effort. Consequently there was no obstruction of justice or flouting of the Court's authority.

As has been stated heretofore, all the United States Attorney need do is ask the defendant either before the Grand Jury or before the Court, the addresses of the merchants, whose names it is admitted are in the records, and the alleged obstruction to the investigation is removed. It is evident that the United States Attorney and the Federal Bureau of Investigation were remiss in their duty to complete the investigation.

Conclusion

The government failed to prove the defendant guilty of a criminal contempt of court beyond a reasonable doubt, and the Court erred in finding that the defendant had failed to purge himself of the alleged contempt of court.

The decision of the Court below should be reversed and the information dismissed.

Respectfully submitted,

WILLIAM MERRITT,
Attorney for Defendant-Appellant.

APPENDIX

United States District Court

SOUTHERN DISTRICT OF NEW YORK

—o—

THE UNITED STATES

vs.

STANLEY HECHT

—o—

Crim. No. C 153-87.

Violation, Contempt of court.

Failure to produce records pursuant to a subpoena of May 1957. Grand Jury.

Docket Entries

(Tr. pp. A-B)

Date	*Proceedings*
	On May 15, 1957 the witness is brought before Hon. Lawrence E. Walsh after refusal to produce corporate records pursuant to subpoena. Witness directed to produce corporate records called for by subpoena.
6- 4-57	—Hearing concluded before Hon. Edmund L. Palmieri. Court adjudges witness to be in contempt and sentences him to three months at a place of confinement to be designated by the Atty. Genl. If at any time he complies with subpoena duces tecum defendant may purge himself of said contempt. Bail fixed at $5000. Remanded. Deft. to surrender for service of sentence on 6-5-57 at 9 A. M. is bail of $5000 is posted. Palmieri, J.

Docket Entries

6- 4-57—Filed Court's Exhibit #1—stipulation that criminal contempt proceeding be held without required notice. Approved. Palmieri, J.

6- 5-57—On application of defendant the Court orders the hearing re-opened. Both sides rest. Court adheres to original decision of 6-4-57 and signs order of judgment and commitment. Bail fixed at $5000 pending appeal. Palmieri, J.

6- 5-57—Filed order of judgment and commitment. Palmieri, J.

6- 5-57—Filed notice of appeal. (EWB)

6- 5-57—Filed bail bond pending appeal for $5000. Public Serv. Mutual Ins. Co.

6- 7-57—Filed remand dated 6-4-57. Palmieri, J.

6-19-57—Filed affidavits and notice of motion for an order enlarging the bail limits of Stanley Hecht.

6-25-57—Memo endorsed on motion to enlarge bail limits of Stanley Hecht. Motion argued. Motion granted. Order to be signed. Palmieri, J.

6-27-57—Filed order enlarging bail limits of Stanley S. Hecht. Consented by U. S. Atty. and Surety, dated 6-27-57. Palmieri, J.

7- 1-57—Filed transcript of record of proceedings, dated 6-4, 5-57.

Judgment and Order of Commitment

(Tr. pp. 147-148)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A Grand Jury of this Court having applied on May 15, 1957, for a direction to Stanley S. Hecht, as President of World Over Trade Corporation, a New York corporation, to produce certain books and records of said corporation, called for by a subpoena duces tecum issued by the Clerk of this Court, dated March 27, 1957, the witness being at that time and thereafter the President and a Director of said corporation, and oral argument having been heard in connection with said application, at which argument Stanley S. Hecht appeared with counsel in opposition thereto, and this Court having directed Stanley S. Hecht to produce all of the books and records set forth in said subpoena duces tecum, and Stanley S. Hecht having failed to produce said books and records, and a stipulation having been entered into waiving notice for a hearing to be conducted in open court to ascertain whether Stanley S. Hecht was in contempt of Court for having failed to produce said books and records, and said hearing having been held in the presence of Stanley S. Hecht and his counsel, Ernest W. Brunner, Esq., and the Court having concluded after the taking of testimony and the hearing of arguments and after due deliberation that the witness, Stanley S. Hecht, had failed to give adequate excuse for not producing all of the books and records of said corporation, which at all times were in his possession or under his control, pursuant to the said subpoena duces tecum and the direction of the Court,

and that the action and conduct of the witness in failing to produce said books and records in compliance with the lawful order of this Court was wilfull and contumacious and constituted a criminal contempt, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, the said Stanley S. Hecht be and he hereby is adjudged guilty of criminal contempt of this Court and is hereby committed to the custody of the Attorney General or his authorized representative for a period of ninety (90) days, unless he shall sooner purge himself of such contempt by substantial compliance with the said subpoena duces tecum in producing the aforesaid books and records before this Court, or is otherwise discharged according to law, at

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that said copy serve as the commitment of the defendant.

Dated: New York, N. Y., June 5, 1957.

EDMUND L. PALMIERI,
U. S. D. J.

Excerpts from Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before: HON. EDMUND L. PALMIERI, *District Judge.*

New York, June 4, 1957.

Appearances:

PAUL W. WILLIAMS, Esq., United States Attorney, for the Government; by WILLIAM K. ZINKE, Esq., Assistant United States Attorney.

WILLIAM MERRITT, Esq., ERNEST W. BRUNNER, Esq., Attorneys for the Witness.

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[2] The Court: Do you wish to make a statement?

Mr. Zinke: Yes, your Honor, I do.

There has been a stipulation which has been entered into between the Government and the defendant and his attorney, waiving the notice which is required under Rule 42(b) of the Federal Rules of Criminal Procedure, which I would like to furnish to the Court (handing).

The Court: Very well. The stipulation is approved. I direct the clerk to make it a part of the record as a court exhibit.

The Clerk: Court's Exhibit No. 1.

Mr. Zinke: Shall I proceed, your Honor?

The Court: Yes.

Mr. Zinke: The Government would like to state at the outset, your Honor, the reason for this proceeding and the

purpose for which it is being held.' This is a proceeding under Rule 42(b) of the Federal Rules of Criminal Procedure against the defendant Stanley Hecht, who was served a subpoena duces tecum on March 27, 1957, as president of World-Over Export Trade Corporation for the production of certain books and records of the corporation. Specifically, the subpoena required the production [3] of all books and records for the calendar year 1956 and the year 1957 up to the time of the serving of the subpoena on World-Over Export Trade Corporation, including all correspondence, quotations, invoices, freight bills, export and import licenses, bills of lading or receipts, bank statements, checks, letters of credit, corporate tax return for the year 1956 and any and all other data relating to the operation of said corporation.

The Government would offer this subpoena as Exhibit No. 1 in this proceeding in evidence. May I show it first to the defendant's attorney (handing to Mr. Brunner)?

The Court: Yes.

Mr. Brunner: No objection.

(Marked Government's Exhibit 1.)

Mr. Zinke: At the time I offer this as Government's Exhibit No. 1, I ask for a stipulation from the attorney for the defendant that the defendant was served with this subpoena on March 27, 1957.

Mr. Brunner: We will so stipulate.

Mr. Zinke: Thereafter the defendant Hecht did produce some of the books and records called for in the subpoena duces tecum, but all of the [4] records relating to transactions between the corporation and suppliers in the United States through whom textiles and other goods had been purchased to fill orders abroad under our ICA program, International Corporation Administration program, were conspicuously absent; at the time the defendant knew that these transactions were under investigation by the

Federal Bureau of Investigation which was the reason for the service of this subpoena in the first instance.

Because of the conspicuous absence of the pertinent books and records of the corporation, Mr. Hecht was subpoenaed to appear before the Grand Jury and on May 15, 1957, he did so appear.

At that time he was questioned as president of the World Over Export Trade Corporation as to the books and records of the corporation which he had failed to produce.

The defendant repeatedly refused to answer questions of a general nature as to the books and records of the corporation, claiming the Fifth Amendment as his reason for failing to answer, although he stated in answer to questions by the Government before the Grand Jury that he did not believe that his answers would tend to incriminate him.

[5] He was brought before Judge Walsh in Room 318 on May 15th and he was directed by Judge Walsh to produce the books and records of the corporation pursuant to the subpoena duces tecum, to produce any of the books and records, I should say, which he had failed to produce pursuant to the subpoena duces tecum served upon him.

He was also instructed by Judge Walsh that there was no privilege attaching to questions of a general nature relating to the books and records of this corporation.

[8] The Court: Resume the hearing.

Mr. Zinke: As the result of Mr. Hecht's testimony before the Grand Jury on May 17th, a transcript of which is Government's Exhibit 3 in evidence, the defendant was again brought down to Room 318 before Judge Walsh, and Judge Walsh again directed him to answer questions of a general nature pertaining to the books and records of the corporation.

Sigmund L. Cohn—for Government—Direct

On May 28, 1957, the defendant appeared for a third time for the Grand Jury. On this occasion he did testify, he did answer questions put to him relating to the books and records of the corporation, and the general manner in which they were kept.

The Government offers as Exhibit 4 in evidence in this proceeding a transcript of the testimony of the defendant on the third occasion before the grand jury on May 28th.

* * *

[15] SIGMUND L. COHN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Zinke:

* * *

[16] Q. When did you begin your employment with the corporation, approximately? A. Approximately in March 1956.

Q. And up to what time did you continue your employment? A. Until February 1957.

* * *

[21] Mr. Zinke: I will withdraw that last question, your Honor.

Q. Thereafter, Mr. Cohn, were purchase orders prepared in the office of World-Over Export Trade Corporation? A. Yes, sir.

Q. Who prepared them? A. I did, sir.

[22] Q. I beg your pardon? A. I prepared them at the direction of Mr. Hecht.

Q. How many copies did you prepare? An original and how many copies? A. Two original copies and one export copy.

Q. What was the extra copy for? A. The extra copy was a copy to be signed by the supplier of his acceptance.

Q. What was to be done with that? A. To be returned to the importer.

Q. Were the signed copies returned by the suppliers with their acceptance thereon? A. Yes, sir.

[26] Q. Did you see the orders, Mr. Cohn, received from the far eastern customers, customers in Vietnam?

Mr. Brunner: I am sorry. I did not hear that.

Mr. Zinke: Would you read the question?

(Question read.)

Q. Did you see those orders? A. At a later date I saw them.

Q. Do you know what quality goods were called for by those orders?

Mr. Brunner: Objected to as irrelevant and immaterial as to this issue as to whether or not—the issue is whether the documents were lost or not lost. That is the only issue.

Mr. Zinke: Your Honor, they bear upon the wilfulness of the defendant in this case.

Mr. Brunner: They have nothing to do with the question of whether or not the documents are in their possession or had or had not been delivered to the defendant.

The Court: It may show some reason for [27] wanting to conceal them and not produce them. It may also tend to establish whether the reason was valid or invalid. I will allow the question.

Sigmund L. Cohn—for Government—Cross

[37] Q. There was other bookkeeping that you would [38] currently do, was there not, in the preparation of invoices or bills? A. No, sir.

Q. There were not? A. No, sir.

Q. There were not? A. No, sir.

Q. Were any books of account kept at all? A. There were books in the office, but I had nothing to do with it. I do not know anything about bookkeeping.

Q. Regardless of whether you do, who did it? A. The accountant who came in.

Q. Who posted the entries in the books? A. I believe the accountant did it. He came in every four weeks or five weeks or six weeks.

Q. Who prepared the papers for the accountant to make the entries from? A. I do not now, sir. I did not.

Q. You did not? A. No, sir.

* * *

[43] *Cross-examination by Mr. Brunner:*

Q. Mr. Cohn, you testified regarding the purchases of certain tires. Am I correct in stating that your testimony was to the effect that Mr. Hecht's correspondence at all times disclosed reconditioned or recapped tires? A. To the best of my knowledge, sir, the correspondence mentioned recon. tires.

Q. And recon. tires were what were shipped, is that correct? A. Yes, sir.

Q. You stated that, except for one shipment, to your knowledge, the other shipments were complete; is that right? A. Yes, to the best of my recollection.

* * *

[48] Mr. Brunner: Thank you, your Honor. I will go to another point, then.

Sigmund L. Cohn—for Government—By the Court

Q. Concerning the amount of shipment of the textiles, is it fair to again state that you do not know of your own knowledge what, if any, textiles were shipped by Mr. Hecht after you left his employ? A. I do not know. I was not there. I do not know.

* * *

[52] Q. When did you say you left the employ of Mr. Hecht? A. February, 1957.

Q. Can you state how long before that time it was that you last had occasion to have particular correspondence and invoices and packing lists, and so forth, in connection with these various shipments? A. Are you talking about textiles?

Q. Textiles and tires. A. Textiles, I would say, lasted for those that we handled, would have been around June 1956.

Q. Isn't it— A. July, 1956.

Q. We can say that for about the last six months when you were there you had no occasion to check into whether or not those files—whether those documents were still in the files; is that true? A. No particular reason.

* * *

[58] *By the Court:*

* * *

[59] Q. Do I understand your testimony correctly to be that in all of the instances, practically 90 per cent of the instances, that you saw goods shipped out, these Vietnam customers, the quality of the goods shipped was inferior to the sample which was sent by the customer? A. I would like to qualify that. I only got very small samples from Mr. Hecht, as far as the quality is concerned, which he wanted to buy. Consequently, when I went out into the open market and to the primary converters, I was looking for those qualities, not knowing, naturally, in the begin-

ning, that anything else but those qualities were considered, I obtained first quality offers.

From the small sample you cannot see whether [60] it is first quality or second quality or third quality or fourth quality.

Q. But you can state that the goods shipped were of inferior quality and never of first quality, is that right? A. The goods shipped were second quality.

Q. They were seconds? A. Yes, sir.

Q. They were never of first quality? A. No, sir.

* * *

[61] JAMES T. MULROY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Zinke:

* * *

[62] Did there come a time when you did examine the [63] books and records of the corporation? A. Yes.

Q. Approximately when was that? A. Approximately April 1st.

Q. Can you identify this book to which I direct your attention? A. Yes.

Q. What is that book? A. This is a book of World Over Export Trade Corporation reflecting the cash receipts book, cash disbursements, general journal, general ledger; a combination of all of their books.

Q. Let me ask you this, Mr. Mulroy: for what purpose were you making your investigation? A. The FBI had received an allegation from the International Cooperation Administration—

Mr. Brunner: I respectfully submit that that is purely hearsay regarding this particular defendant.

The Court: Yes, sustained. Ask the witness to describe the purpose of this investigation, without referring to assertions made by third parties and charges made. What you are looking for and what you were seeking to ascertain, what the nature of your search was.

[64] The Witness: I was seeking to determine the nature of the purchases by World Over Export Trade Corporation, which purchases of the World Over would have eventually found their way to a sales book and the merchandise would have found its way to the far eastern market of Vietnam and Cambodia.

I was attempting to follow the chain of goods from this country to the far east.

Q. In connection with your examination of the books and records of World Over, did you find that copies of purchase orders were retained in instances in the files of the corporation? A. I cannot say. I went through the books and records of the corporation looking for data in connection with the far eastern countries of Cambodia and Vietnam; purchase orders in connection with transactions to those countries I was looking for. I did not find any such purchase orders.

* * *

[65] Q. Did you find any papers in the files of the corporation in regard to these transactions? A. I did.

Q. What did you find? A. I found the correspondence files relating to negotiations with importers in Cambodia and Vietnam, general letters of correspondence.

I found copies of bills of lading for goods going to the far east. I found copies of invoices for goods going to the far east.

Q. From World Over to purchasers— A. From World Over to purchasers in Cambodia and Vietnam. I found

copies of packing lists for textiles which were sent to Vietnam. I found copies of letters of credit with the Chase-Manhattan Bank. And I believe the Manufacturers Trust Company were in the textiles and rubber tires being shipped to Vietnam and Cambodia.

Q. Generally speaking, Mr. Mulroy, would you say that the files of the corporation were fairly [66] complete with regard to transactions between World Over and the customers in the far east? A. As far as the goods which found their way to the far east is concerned, I was unable to find any record relating to the purchase of those goods in this country anywhere, in fact. They showed them coming in to the books of the corporation, although there would have been data in connection with the sale of those goods to the far east.

Q. To repeat my question, would you say that generally speaking the files of the corporation were fairly complete with regard to the transactions between World Over and the customers abroad? A. To that question, on the surface it appeared to be complete, but on occasion, in reviewing these files, I do see where there are copies of letters missing.

For instance, a foreign importer writing a letter to World Over referring to "our letter of such-and-such a date," and that particular letter might not be found in the file. The same way with World Over to a foreign importer, "referring to our previous letter of a particular date:" on a few occasions those types of letters of reference were [67] missing, but generally speaking they were filed complete.

Q. Did you find any papers in the files of World Over with regard to transactions between the corporation and suppliers in this country? A. Yes. I found there were invoices for typewriter repairs and things of that nature, purchases of paper, invoices of that nature were in the files.

Q. How about papers with regard to transactions between World Over and suppliers in this country of textiles and rubber tires? A. I was unable to locate any such papers.

Q. Any papers? Purchase orders? A. I was unable to locate, for instance—I worked from the book of World Over, the cash disbursements book.

The checks issued by World Over are listed chronologically and there is a total column indicating the amount of the check. It is then broken down to what the particular check was for. For instance, the purchases of goods in the column in the book, and it was items of that nature that I was interested in, the purchase of goods and textiles and rubber tires, and those rubber tires would be indicated.

There is another column here for general items, [68] miscellaneous, where you might find office expenditures on typewriter service, and things of that nature.

First, the checks were all mixed up. I put about 100 of the checks in order and then I went through the checks chronologically and found that certain checks were missing.

Q. Which checks were those? A. The checks that were missing are the canceled checks of particular items purchased.

Q. Which items purchased? A. The items which would be indicated in this book in the purchase column, which would reflect the purchase of rubber tires and textiles. For instance, they were the only checks that were missing of these 100 that I put in order.

Q. All the other checks were there? A. All the other checks were there in chronological order, rather than waste my time putting all these checks in order, then looked up the names of the supplier.

Q. Did you find the names of those? A. Yes, they are listed there in the book. I went through the balance of the checks to see if I could find the canceled check indicated

by the cash [69] disbursement book, in order to start this rolling. I was unable to locate any of the canceled checks for this particular purchase of goods. I was unable to locate the invoices covering these items which were indicated as paid. I was unable to locate any order for these goods; unable to locate any letter of transmittal which might accompany the check of the particular vendor.

I noticed that there was a packer employed or used by World Over. I was unable to locate any instructions of World Over to the packer as to how the goods should be packed and shipped.

After spending three days looking through all of the files that were in the two offices and actually handling all of the folders in these file cabinets, and with Mr. Hecht going through the drawers, the desk drawers, I was unable to find anything relating to these items that I have just mentioned.

I speke to Mr. Hecht about it. He was at a loss as to why these documents should be missing. In fact, he went through the cabinets himself trying to find these documents for me. He was at a loss as to an explanation. He pointed out to me that in some instances the charwoman may have come around and actually thrown records away.

* * *

[70] *Cross-examination by Mr. Brunner:*

* * *

[72] The Court: Sustained.

Q. During the three days that you were at the office were you given full authority and leave to go through the office as you pleased? A. Well, all records of the corporation were subpoenaed, a subpoena duces tecum had been issued, and when Mr. Hecht appeared in pursuance of the subpoena duces tecum, there was only canceled checks indicating that there was a huge volume of files and it was

agreed that he would permit an FBI agent to go up to his office and review the files, and I reviewed whatever files he had, in pursuance to this subpoena duces tecum.

Q. Whatever you wished to see there or look at, you were permitted to do so, is that right? A. Certainly.

* * *

[74] Q. And after spending about three days there you took away approximately a little over 700 documents, is that correct? A. After spending three days there, I got together the only papers that I could find dealing with transactions in Cambodia and Vietnam, which documents were of interest to me from my investigation and which I would want to examine very, very closely; rather than to take up space in an office there with two desks, I received permission from Mr. Hecht and yourself to remove those documents and examine them at my leisure, and in return I gave a receipt. I explained to you and Mr. Hecht at the time that these were merely documents relating to correspondence with these people in Vietnam and Cambodia.

Q. Now, Mr. Mulroy, many of these documents that are open to you and which you picked up were documents, which you now have in your lap, disclosed the names of suppliers and packers, and so forth, isn't that correct? A. Where a check was made out to a particular person—I never saw the canceled check.

Q. I appreciate that. My question to you is whether the names of these suppliers who would have [75] received the canceled checks were found by you in documents which you picked up at this office, is that correct? A. The only evidence I have of any suppliers named or anything relating to a supplier is from an indication in this book that, for instance, check No. 143 was issued to John Doe, Inc., for example. That was the only indication of any supplier at all that I came across.

Q. And also that same book, which is a large ledger book, contained the name of the packer to whom you previously referred as being a packer to whom these shipments were delivered for packing, is that correct? A. There was a name of a packer indicated in this book.

Q. That information was obtained by you or was disclosed to you from the ledger book which you picked up at the office of World Over Export Trade Corporation? A. That is correct.

* * * * *

[76] *Recross-examination by Mr. Brunner:*

* * *

[77] Q. One more question. After you discovered these names of the corporations and persons, did you ask Mr. Hecht whether he could give you the address or further information on these persons? A. I did not disclose to Mr. Hecht anything that was in this book. I did not take it up with him at all.

* * *

[79] The Court: I think you should speak first. A prima facie case has been made out and you have the time to submit any proof. Unless you can point out some reason why your client should not be held in [80] contempt, it seems to me that this is a plain case for such a holding.

* * *

[83] The Court: How did they disappear?

Mr. Brunner: There again, your Honor, we can very well explain that. The situation under which this man operated was such that he had a small office and even that he does not use alone, but he shared space with other people, not even in business with him. There are times when because of the lack of adequate desk space, and so forth, he filed things or put things in chairs and he may have been working, but I do not state that as a fact, but even in questioning the witness he has not been able to

say that as a fact. He very obviously said to me, "I do not know."

The Court: There is nothing as to the record—you have declined the oppertunity to submit any evidence or offer any excuse. As I understand you, you are saying that on the record before me your client is without blame and should not be held in contempt.

Mr. Brunner: I submit, your Honor, that contempt is a wilful disobedience, and on the record here there is nothing to show that this person wilfully withheld records. The witness stated that almost [84] the tires were shipped to Cambodia and said only one shipment was not completed. Certainly, the record showing the purchase of these tires would be to his advantage, yet those records are missing.

The United States Attorney made much-to-do about the fact that the records dealing with the other part of the transaction were all there. If they had not been there, we would hear the converse of the story. But those records were missing. Those records were all there. The books which were turned over to Mr. Mulroy, were turned over to him voluntarily, and certainly that could not have been accidentally turned over. It was a large book, the largest individual document by far that was in the possession of this defendant. That book was turned over to Mr. Mulroy and that book contained the very names of the parties that they are now making an issue of not having records pertaining to.

Yet Mr. Mulroy stated that he did not want to disclose to Mr. Hecht the fact that he had these names and wanted their addresses. The witness cannot be held to blame for the fact that they did not want to disclose the names which were in his own books, and he could have very well said to them, "Who is [85] such-and-such and where is his office?"

They had the information, and the information was not obtained from some third party or outside party. It was information voluntarily given to them by this very defendant. They had it. They examined it. They got the names. They chose for their own reasons not to come to this defendant and say, "Bring out the records." What possible harm could have come if he had said, "Look. Here is a check that went out to so-and-so. Where is his office?" They preferred not to make that statement.

Now they come here and want to hold him responsible because he did not produce the books and records pertaining to this person.

Sure, these books and records were lost, but he could have easily said, if he had been asked, or to have given the information they requested. On the one hand they were dealing with him in absolute secrecy and then they came to your Honor and said, "Because we have dealt secretly with him, because we were not open with him and we did not want to tell him what we were doing, we think he should be held in contempt of court."

I respectfully submit, your Honor, that I [86] do not think that anyone in this court room or in any other court room can say that he has never lost anything of value, whether money or papers or documents. Here is a man who is engaged individually, and it is a one-man corporation where he has got thousands of things on his mind. There were innumerable letters and correspondence between him and this person in Cambodia or Vietnam, or wherever it is, and the documents are in possession since April 2nd, have been in the possession of the Government. Those documents clearly show the tremendous bickering back and forth, the discussions back and forth between them about this correspondence.

It is most conceivable and natural that sometimes between last June and now, a period of a full year, that he would have had occasion to pull it out of these files and,

to refer to them in connection with the correspondence that he has been carrying on with these people abroad. He could not carry those figures in his head. And somewhere in dictating the letters and somewhere in carrying on this correspondence these documents were lost or mislaid or they were destroyed. I do not know what happened to them, your Honor, but certainly this is a criminal [87] nature proceeding and he is entitled to have his case proven against him beyond a reasonable doubt.

I respectfully submit that where the evidence is that only one man, not seeking these documents in a full year according to his own admission, while the documents in the hands of the Government clearly show that these transactions were active right up to the present time, correspondence back and forth, and natural referral by this man to that correspondence—obviously Mr. Colin did not answer that correspondence. He did not even see it. Yet that correspondence was answered, and that is in black and white in the record given to the Government and that correspondence was answered and reference must have been made to these documents, and if reference is made to these documents there is a most logical reason, your Honor, and if one got lost they were probably all in the same files. The whole thing amounted to perhaps 50 or 60 pieces of paper. That is the whole basis of this case, that under the circumstances there is no contempt case made out against this defendant.

[95] Mr. Zinke: I would like in closing to point out the difficulty which you may imagine Mr. Mulroy, the FBI agent, has and will have in his investigation. He has names of suppliers somewhere in the United States, any place, and they had to be in the United [96] States at some place. He has to go all over the country or all over any place in order to find out who these suppliers are

from whom purchases were made in order to fill these orders from abroad.

[97] Mr. Brunner: No, if your Honor please. I just again respectfully urge, as I did before, that there has been no wilful act on the part of [98] this defendant as to a disposition of the books and records and that he did not intentionally destroy, lose or otherwise dispose of any records by any act which is a wilful act on his part.

The Court: Gentlemen, it is my conclusion that a sufficient case has been made out to justify my finding that the defendant intentionally and without adequate excuse defied the processes of this Court and has failed to comply with a subpoena duces tecum. His conduct is contemptuous and contumacious. He has persisted in that conduct despite several opportunities to comply with the subpoena, despite clear instructions of the Judge of this Court with regard to his obligations as a witness, pursuant to the direction of that subpoena.

Therefore, I adjudge the defendant in contempt upon the record before me.

I consider now an application to punish him for that contempt. I would like to confer with counsel off the record.

(Discussion at the bench between Court and counsel, off the record.)

The Court: Stand up, Mr. Hecht.

I sentence you to serve a term of three [99] months in jail for contempt of court, upon the stipulation that if at any time you comply substantially with the obligations of the subpoena duces tecum, which up to this time you have failed to comply with, you may be purged of contempt upon the proper showing before a judge of this court that you have so complied.

I direct that you surrender at 4 o'clock tomorrow afternoon and that in the meantime you give bail in the sum of $5,000 for your appearance.

---

[115] Mr. Merritt: If your Honor please, after conference with counsel and with the defendant, the defendant states that he is willing to take the witness stand to explain whatever he may know about the missing documents as originally called for by the Court, but he cannot produce them.

The Court: He declined that opportunity yesterday.

[116] Mr. Merritt: Perhaps on second thought he might purge himself of that contempt and try to explain to the satisfaction of the Court what did happen to those documents.

The Court: I am not prepared to conduct a hearing now. I will be glad to do it tomorrow morning—I cannot do it tomorrow morning, either. How long do you think it will take?

Mr. Merritt: I do not think it will take more than five minutes.

The Court: All right. I will reopen the hearing for the purpose of hearing him.

STANLEY S. HECHT, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. Brenner:

[117] Q. Besides those employees did you have any accountants during that past year? A. Yes.

Q. How many accountants did you have? A. About six.

Q. Were they simultaneously or consecutively? A. Consecutively.

[120] Q. During this past year did any occasion ever arise when you were unable to locate any documents? A. Yes, this happened. I just need for the record for my accountant certain invoices.

Q. Please tell us when that occurred. A. The last time maybe in January or December or January, I need certain invoices to file for the packer and I looked. This happened in December and January. These transactions were only that I needed the invoices. So Mr. Cohn said, "You had them on your desk the day before."

We looked. Of course, the bookkeeper would make these entries in the books, with the proper invoices. But we did not find them. This happened long before the FBI came into the picture.

Q. Did you ever make inquiry of anyone else as to what might have happened to those documents? A. Yes.

Q. Please tell the Court. A. It happened on a few occasions, not only as to catalogs but correspondence which has been separated in a chair next to my desk, in a chair, because of the [121] space is too small, and sometimes stationed in the corner or on the floor. Just for the purpose of having him select the documents, it happened once in a while I used to telephone on that day and never come back into the office, more missing papers. So I asked the cleaning woman, that I had left there forms of various correspondence. She said she had orders from the superintendent that whatever was found on the floor is to be thrown away. So I make this claim to the superintendent long before last year. This happened maybe twice or three times. He said whatever was left on the floor was to be thrown away. These are the superintendent's order and instructions, to throw them away.

Q. Did you ever notify the superintendent or advise the cleaning woman to destroy or throw away any of the documents which are now missing? A. No, sir. The cleaning woman, she came in at 5 o'clock in the afternoon.

Stanley S. Hecht—Defendant—Cross

Q. Did you at any time personally destroy any of these documents? A. No, no reason for it. I needed this correspondence and documents for later purchases.

Q. Do you have any of the documents in your [122] possession which are now missing and which you have been directed to produce? A. No, sir. I went through with Mr. Mulroy, I went through, myself, to ascertain it. We looked back and forth for the missing correspondence. I looked in and made a list from the correspondence and other documents.

Q. Do you know where these documents would be located? A. No, sir.

Q. Were any other documents ever destroyed by yourself or anybody with your approval? A. No.

Q. If you had those documents, would you produce them? A. With pleasure.

Q. Do you know when and where you last saw the documents, or any of the documents which are missing and which have not been produced? A. I recall my accountant asking for those invoices for transactions in Saigon and Cambodia, to make the proper entries, the accountants, about December or January of this year.

Q. Since then have you seen them? [123] A. No, sir.

* * *

[126] *Cross-examination by Mr. Zinke:*

* * * *

[137] Q. Let me ask you this: You wouldn't suggest that any of the invoices were just thrown on the floor of your office, would you? A. No, not purposely because I need these invoices to buy tomorrow merchandise from the same suppliers and to buy next year because certain suppliers give me an excellent service and special price, so I need these invoices for later purchases.

* * * * *

[142] Q. How do you account for that? A. But Mr. Mulroy don't told you a very important fact, that he found

in different files different checks, more checks, not organized properly, in the proper place.

The Court: What you are saying, in effect, is that a great many more documents than these are missing.

The Witness: Yes.

The Court: And you don't know how it happened.

The Witness: Yes.

The Court: Except that you were not there most of the time and you were not well organized.

The Witness: Yes, it is true.

[144] The Court: I adhere to the decision I reached yesterday, and I am filing this order in the terms which I have already read, and I adhere to the imposition of the same sentence with the same purging clause.

However, in order to be completely fair to this man, and in order to relieve myself of any possible —even the remote and almost unreasonable—doubt, I want to be sure that we are being completely fair, and I would appreciate it, Mr. Zinke, if you would ask the FBI agent if he could please interview the superintendent of this building and the charwoman to find out whether there is any basis whatever to this witness's claim that his business documents apparently disappeared from his office, and that he complained about it on a number of occasions, because, if there is any basis for such a claim, I would like to have the charwoman and the superintendent examined and I think you should ask them to communicate with the accountant who worked for his business, as well.

Mr. Zinke: I was about to add, your Honor, that if Mr. Hecht would furnish me with the names of

his accountant, I will be glad to have the FBI [145] immediately contact them and see what substance there is to the statements which Mr. Hecht has made.

The Witness: The name is Mr. Voker. You have him in the checkbook.

The Court: I will give you an opportunity to confer with your lawyers and with Mr. Zinke so that he can take down the names and addresses of these people to see whether there is any basis for it.

But my own view is that it is incredible that so many business records could have just disappeared in the manner this witness claims. I cannot credit his story.

All right. I am filing the order.

Mr. Merritt: Before your Honor leaves, might I make an application that bail be set pending an appeal in this matter?

The Court: Well, I fixed bail in the sum of $5,000. I grant your application and fix bail in the sum of $5,000.

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FILED
DEC 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 681

STANLEY S. HECHT,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

STANLEY S. HECHT,

Petitioner.

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Stanley S. Hecht, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 23, 1957.

Opinion Below

The court of appeals wrote no opinion in this proceeding; it merely noted: *Per Curiam*: "Affirmed. *United States* v. *Johnson*, 247 F. 2d 5."

Jurisdiction

The judgment of the Court of Appeals was entered on October 23, 1957. Mr. Justice Harlan granted petitioner an extension until December 23, 1957, to file the petition for writ of certiorari in this proceeding. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254 (1).

Questions Presented

The questions presented in this case relate to the sufficiency of the evidence of non-compliance by petitioner with the grand jury subpoena *duces tecum* served upon him as an officer and director of a corporation, and with respect to his failure to comply with the district court's direction to obey said subpoena; to the sufficiency of the evidence of the existence of the alleged non-produced records at the time of the service of said subpoena; to the sufficiency of the evidence of criminal intent by petitioner in failing to comply with said subpoena and district court direction; and to the good faith compliance by petitioner with the order of the district court to produce said records, and that all said records have been produced or furnished to the government.

Statute Involved

The statute involved in this case is Title 18, United States Code, §401(c), which reads as follows:

> A court of the United States shall have power to punish by fine and imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701.)

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Stanley S. Hecht, was convicted of criminal contempt of court in the District Court for the Southern District of New York, for failing to produce before a grand jury, in response to a subpoena *duces tecum* served upon him, certain corporate books and records of World Over Export Trade Corporation, of which petitioner was president. On June 5, 1957, petitioner was adjudged in criminal contempt and sentenced to three months' imprisonment; he was released in $5,000 bail pending appeal, which bail remains effective pending review by this Court. The district court held that petitioner had failed to comply with the grand jury subpoena *duces tecum* and the order of the court to produce the required records. The court of appeals affirmed this finding on October 23, 1957, but stayed its mandate pending review in this Court.

The Record

The record of this case before the court of appeals was the certified original record of all of the proceedings in the district court, with the exception of four government exhibits received in evidence, but which remained in the possession of the United States Attorney for the Southern District of New York, and printed appendices by both petitioner and respondent in the court of appeals. The aforesaid exhibits have been ordered certified by the court of appeals below upon application of petitioner for transmittal with the original record of the district court, and this petition is based upon the complete record of the proceedings in the district court as hereinbefore mentioned.[1]

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[1] Wherever numbers in parentheses are indicated, they refer to pages in the certified original record.

The Facts

On April 5, 1954, an indictment was returned in the district court below in which petitioner and World Over Export Trade Corporation, among others, were named as defendants. This indictment charged a conspiracy to violate certain customs, laws and regulations by the use of certain false and fraudulent statements, invoices, declarations and affidavits, among other things, in violation of Title 18, U. S. Code §371.[2]

During the pendency of this case and before it was moved for trial, the United States Attorney on March 27, 1957 caused a subpoena *duces tecum* to be served upon petitioner as President of World Over Export Trade Corporation, for the production of books and records of the corporation before the grand jury sitting in the district court below. This subpoena was very broad and comprehensive and required petitioner to produce:

> "All books and records for the calendar year 1956 and the year 1957 to date of World Over Export Trade Corporation, including all correspondence, quotations, invoices, freight bills, export and import licenses, bills of lading, receipts, bank statements, checks, letters of credit, corporate tax return for the year 1956 and any and all other data relating to the operation of subject corporation" (Exhibit One, 336).

Following the service of said subpoena, petitioner arranged with the Federal Bureau of Investigation to permit the agent in charge of this case, James T. Mulroy, to

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[2] Although this indictment is not part of the record in the district court below, nevertheless, it is referred to during the contempt proceedings, and this court is requested to take judicial notice of said indictment and its pendency in the district court (100, 102, 103, 104).

come to his office and go through his files for the purpose of obtaining whatever documents and records were required by the government for its investigation herein. On April 3, 1957 Mr. Mulroy visited the office of World Over Export Trade Corporation and for three days he went through the files of this firm, removing more than 700 documents therefrom. During the course of his investigation, Mr. Mulroy asked petitioner about certain particular records which were missing. Petitioner explained that all of his records were in the office, but that the charwoman might have thrown some of them away. It appears that this office consisted of two small rooms and contained several desks and file cabinets; that there were more records than file space and some of the records were kept in carton boxes and on the floor of the office. Mr. Mulroy was given untrammeled and completely free access to all of the corporation's records. He took with him whatever he wanted.

Following Mr. Mulroy's departure from World Over's offices, on May 15, 1957 petitioner was brought before the grand jury and asked a great many questions with respect to the details of his transactions with export firms which were the subject of the pending investigation. To most of the questions put to him he invoked the privilege against self-incrimination and he was thereupon taken before the district court for the purpose of compelling his answers to said questions. District Judge Lawrence E. Walsh directed petitioner to produce whatever non-produced records he had failed to produce, but he also advised the Assistant United States Attorney that except as to questions touching on the whereabouts of the non-produced records, petitioner could not be required to answer questions which would "compel him to disclose the occurrence of events in connection with a particular transaction" (18).

Petitioner thereupon returned to the grand jury where he again testified that all records in the possession of the corporation called for in the subpoena were produced or permitted to be taken from the corporation's files by the FBI. Petitioner was before the grand jury again on May 17, 1957 and May 28, 1957. On June 4, 1957 contempt proceedings were commenced before District Judge Edmund L. Palmieri.

The government called two principal witnesses to testify in the contempt proceeding. These witnesses were Sigmund L. Cohn, a former employee of petitioner's firm, and Special Agent James T. Mulroy of the Federal Bureau of Investigation. Mr. Cohn testified, in substance, that records were kept of all transactions engaged in by World Over and that he had last been employed by this firm in February, 1957. To his knowledge, copies of invoices, correspondence and other records were kept by the corporation. He did not have exclusive access to the files and he knew that there were other persons employed on a part-time basis and that the firm employed various accountants who also had access to these files. Following his departure, he had no knowledge of the whereabouts or existence of the corporation's records. This witness did not give any testimony concerning the existence of particular records; his answers were couched in broad general terms.

Agent Mulroy, an accountant, testified that certain particular records in which he was interested were not found by him in the files of the corporation, although he was given free access to these files for a three day period. He took more than 700 documents from the files of the corporation during the course of his examination, which he took away with him. He testified that there were files and records all over the floor but that "important papers were found in the file cabinets" (76). During the course of his

examination he had occasion to ask petitioner about certain records and while petitioner was very cooperative, he, nevertheless, explained that the charwoman might have thrown away records which were lying on the floor. There is no testimony that Agent Mulroy made any investigation of this claim at any time thereafter. He also ascertained that petitioner did not take records out of the files and out of the office with him.

The district court held petitioner in contempt on the basis of this showing, notwithstanding the complete cooperation of petitioner in enabling Agent Mulroy to examine freely all of the records of the corporation at its offices and to take with him more than 700 records he desired. Following the adjudication of contempt and the sentence of three months' imprisonment, on June 5, 1957 petitioner was permitted to introduce evidence in support of his good faith compliance with the requirements of the subpoena *duces tecum*. Petitioner testified that the size of his office, the volume of records maintained and the fact that the charwoman sometimes threw records away while cleaning, all were factors to be considered in support of his good faith compliance with the subpoena. Sometimes he, himself, was unable to locate documents required in connection with the operation of this business (120). In addition, all of the transactions conducted by World Over were entered in the books of account of the corporation and these books of account were fully exposed and made available to Agent Mulroy and every transaction was reflected in these books. In addition, various of the corporate records, such as bank statements and checks, might have been in the possession of the various accountants engaged by this firm to audit its books and to prepare its necessary tax returns.

At the conclusion of petitioner's testimony, the district court stated that it adhered to its decision but it, never-

theless directed the Assistant United States Attorney to have the FBI agent conduct a further investigation in the matter. This investigation was to include an interview with the superintendent of the building and the charwoman who cleaned World Over's offices. Also, that the accountant who audited its books was also to be interviewed. The Assistant United States Attorney advised the court that he would have the FBI "immediately contact them and see what substance there is to the statements which Mr. Hecht has made" (145). Notwithstanding this direction by the court and this statement by the prosecutor, nothing further was done in this regard by the government and the contempt conviction remained standing, while petitioner's case proceeded through the appellate process.

Reasons for Granting the Writ

The decision of the Court of Appeals below rests solely upon its citation of *United States* v. *Johnson*, 247 F. 2d 5. The district judge's finding that petitioner failed to produce all the corporate records called for in the subpoena *duces tecum*, that these non-produced records are in existence, that petitioner's failure to produce these records was willful and with criminal intent and that there was no showing of good faith compliance by the petitioner with the order of the court, is not supported by the evidence adduced in the contempt hearings held in the district court below.

1. This court has often stated that it "has never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support a determination)." (*Mortensen* v. *United States*, 322 U. S. 369, 374.) The evidence of record in this case fairly discloses that petitioner cooperated completely with the government in allowing them free access to the corporate books and records of his corporation, including the

right to remove more than 700 documents from its files. This was done at a time when petitioner was already under indictment and awaiting trial for a prior offense. This first indictment had been returned during 1954, but had not been called for trial as late as March 27, 1957 when this subpoena *duces tecum* was served. It is significant to observe also that World Over was a co-defendant in the pending indictment.

In *Curcio* v. *United States*, 354 U. S. 118, this Court directed entry of a judgment of acquittal for a defendant who failed to produce any of the subpoenaed records of which he was custodian. In this case, more than 700 records were permitted to be removed by Agent Mulroy without any itemized receipt being given therefor. Agent Mulroy's testimony clearly indicates that petitioner was fully cooperative and allowed him free access to all of the corporation's files and records. Agent Mulroy observed the physical lay-out of World Over's offices and he saw that there were many more records kept than available file space to keep them. The questions asked petitioner before the grand jury, as to which he claimed his personal privilege against self-incrimination, did not touch upon the whereabouts of these records but mainly dealt with the contents of records and petitioner's personal participation in the affairs of this corporation. Petitioner and the corporation had already been indicted in 1954 in the district court below on charges arising out of their conduct of this export business and following this contempt adjudication they were additionally indicted in two new separate indictments.[3] Petitioner at no time asserted any personal privilege with respect to the production of corporate records and for this reason, at least, cases such as *Wilson* v.

[3] These new indictments, name as defendants petitioner and the corporation, bear docket numbers C153-240 and C154-100 in the district court below.

United States, 221 U. S. 361 and *United States* v. *White*, 322 U. S. 694 are not applicable to this proceeding.

The district judge before whom petitioner was first taken limited his direction to petitioner to a production of records; petitioner was not required to answer questions dealing with the contents of said records or his personal participation in the affairs of the co-defendant corporation. Although the same procedure was followed here as in the *Johnson* case, *supra*, nevertheless, the evidence of record in this proceeding is far less persuasive and does not support the finding made by the district court. Petitioner's conduct in allowing Agent Mulroy free access to the corporation's records is strong evidence in support of this argument that he has not refused to comply with the subpoena. Petitioner's failure to comply with the subsequent district court direction to produce the non-produced records, which by then had concededly been demonstrated not to be in existence, cannot be considered willful and contumacious. Cases such as *Nilva* v. *United States*, 352 U. S. 385, and *Lopiparo* v. *United States*, 216 F. 2d 87, do not control the facts of this case. Rather they seem to fall within the rule of *United States* v. *Patterson*, 219 F. 2d 659.

2. Examination of the subpoena *duces tecum* discloses that it is very broad and all-encompassing. The failure to comply with the subpoena and the district court's direction must necessarily be considered in terms of proof of the existence of the non-produced records. This proof does not meet the standards set by this Court as to the sufficiency of evidence in this type of case.

No attack was made in the district court against the sufficiency of the subpoena *duces tecum* for failure to particularize the records and documents to be produced. Notwithstanding this fact, this Court may examine this sub-

poena in terms of specificity, to determine the extent of petitioner's compliance with it, for the purpose of observing that the extent of non-compliance is vague and indefinite. Almost any non-production of any particular record could be seized upon by the government as evidence of contempt. That this was precisely the objective of the contempt proceeding is apparent from the record in the district court below. The questions asked petitioner in terms of this setting, and in the light of the then (and still) pending and subsequent indictments against him and this corporation, disclose that the principal objective of the government was to compel him to undergo punishment in advance of trial. The extent of petitioner's cooperation in producing and providing access to the corporation's records is lost in this setting. The evidence of the continued existence of the non-produced records thus is very insubstantial. The witness Cohn testified very generally with respect to the existence of records and his testimony provides no basis for assuming that particular records continue to exist. Agent Mulroy's testimony that he could not locate particular records in which he was interested provides no basis for assuming the existence of these particular records. Standing alone, the mere failure to produce records of a general nature is not proof of the existence of particular records, in the absence of direct proof that particular non-produced records actually exist. The facts of this case require a finding that the government has not met its burden of proof of petitioner's guilt beyond a reasonable doubt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Mason* v. *United States*, 244 U. S. 362, 365; *Hoffman* v. *United States*, 341 U. S. 479, 486-487; *United States* v. *Fleischman*, 339 U. S. 363. Since the evidence against petitioner with respect to the existence of the non-produced records is circumstantial evidence, such circumstantial evidence must necessarily exclude every reasonable hypothesis

of petitioner's innocence. *Maryland & Virginia Milk Producers Association, Inc.* v. *United States*, 193 F. 2d 907, 917.

3. The government has made no showing of the requisite criminal intent on the part of petitioner in willfully failing to produce the records required by the subpoena and the district court's direction to him. Defendants in criminal contempt cases are afforded the same presumption of innocence as are any other criminal defendants on trial. *Quinn* v. *United States*, 349 U. S. 155, 162; *United States* v. *Fleischman, supra; Michaelson* v. *United States*, 266 U. S. 42, 66; *United States* v. *Goldman*, 277 U. S. 229. They also have the same privilege against self-incrimination as other criminal defendants (*Quinn* v. *United States, supra*). In criminal contempt proceedings, criminal intent is an essential element of the crime charged and, as with any other essential element of a criminal case, it must be established beyond a reasonable doubt (*United States* v. *Kroger Grocery and Baking Co.*, 163 F. 2d 168; *Wilson* v. *North Carolina*, 169 U. S. 586, 600; see *Nilva* v. *United States, supra*, page 395, fn. 9 and the dissenting opinion at page 399).

Petitioner's conduct herein negatives any claimed proof of criminal intent. The government's case rests upon the barest showing that certain records were not produced. But in the light of the over-all facts in this case, it is clear that the government has not established beyond a reasonable doubt that petitioner was possessed of the requisite criminal intent to commit a crime of criminal contempt. The finding of contempt by the district court is necessarily based upon circumstantial evidence and it is clear that this circumstantial evidence does not exclude every reasonable hypothesis of innocence. This court need not accept or adopt the "rational derivative inferences" (see *United States* v. *Masiello*, 235 F. 2d 279, 285, dissenting

opinion by Frank, *C.J.*, at page 290, fn. 9) of the district court, and it may determine that petitioner did not commit the crime of criminal contempt with criminal intent.

4. The record is clear that petitioner sufficiently showed his good faith compliance with the subpoena *duces tecum* in permitting the government to have free access to his corporation's records and files. Whatever burden petitioner may have of showing his good faith compliance with the requirements of the subpoena were more than sufficiently demonstrated by his conduct throughout this proceeding. As a matter of fact, the district court's direction to the government and the government's agreement to conduct further investigation of this matter through the interrogation of the building superintendent, charwoman and World Over's accountant, is evidence that the district judge was not fully satisfied that petitioner's conduct was in fact contemptuous (although the district judge held that it was).

This proceeding was commenced by the government in an effort to compel petitioner to answer self-criminating questions, in violation of the rule of *Curcio* v. *United States, supra.* In shifting the emphasis of this proceeding away from such self-criminating questions, Judge Walsh limited the government to showing non-compliance with the subpoena, and the subsequent district court direction to produce the non-produced records. Petitioner's efforts towards compliance are substantial evidence of his good faith compliance with the demands of the subpoena. See *United States* v. *Fleischman, supra,* page 363. Since there was substantial compliance with the subpoena, by the production of all the records and the permission to the FBI to carry away more than 700 of these records, it is clear that petitioner's conduct was not willful and contumacious. See *United States* v. *Gordon,* 236 F. 2d 916, 920.

For the foregoing reasons, it is respectfully submitted that this case warrants review by certiorari.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

December 19, 1957.

Respectfully submitted,

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DANIEL H. GREENBERG
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of October one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. J. EDWARD LUMBARD,
HON. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

STANLEY S. HECHT,
Defendant-Appellant.

JUDGMENT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

JAN 2 5 1958
JOHN T. FEY, Clerk

No. 681

In the Supreme Court of the United States

OCTOBER TERM, 1957

STANLEY S. HECHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
RUFUS D. McLEAN,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
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Attorneys.
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The *per curiam* opinion (R. 59–60) of the Court of Appeals is reported at 248 F. 2d 544.

JURISDICTION

The judgment of the Court of Appeals was rendered on October 23, 1957 (Pet. App. 15, R. 61). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to December 23, 1957, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court was invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there was sufficient evidence to support the trial court's finding of contempt for nonproduction of records.

STATEMENT

Petitioner was president and sole stockholder of World Over Trade Export Corporation. He was found guilty of contempt in June, 1957, in the United States District Court for the Southern District of New York in a proceeding under Rule 42 (b), F. R. Crim. P., for failure to produce before a grand jury in March, 1957, as directed by a subpoena duces tecum, all the corporate books and records for the calendar years 1956 and 1957 (up to the time of serving the subpoena), including all correspondence, invoices, and all data relating to the operation of the corporation (Gov. Exs. 1 and 2; Tr.[1] 77, 147–148). The contempt action was not based on petitioner's refusal to answer questions concerning the records before the grand jury where he invoked the Fifth Amendment,[2] but solely on his failure to produce records specified in the subpoena. He was sentenced to a term of imprisonment of 90 days (Tr. 148). On appeal, the Court of Appeals affirmed *per curiam* (R. 61).

The evidence adduced at the contempt hearing may be summarized as follows:

The subpoena was issued in connection with a grand jury investigation of the purchases by World Over Export Trade Corporation of merchandise which it eventually sold to Vietnam and Cambodia, in transactions financed by the International Cooperation Administration. After an initial refusal, and only after

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[1] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

[2] See the typewritten transcript of the May, 1957, proceedings before the grand jury.

the subpoena had been issued, petitioner permitted F. B. I. agent Mulroy to examine the corporation's books and records (Tr. 62–64). Mulroy found that the records were fairly complete with respect to the transactions between World Over and its far eastern customers, but he could not locate any of the records, including the cancelled checks, relating to the purchase of the exported merchandise from suppliers in this country (Tr. 64–70). From the cash disbursements book, the agent could find the names of the suppliers to World Over, but he was unable to locate from such names alone the purpose of the disbursement or the location of the supplier (Tr. 73–76). Cancelled checks to suppliers were also found, but not the checks for supplies later sent to Cambodia and Vietnam. The agent also testified that there were papers and magazines on the floor, but that none of these papers were corporate records as such. (Tr. 67–69.)

At the grand jury hearings, petitioner could not explain the loss of these documents except to say that the charwoman may have come around and thrown them away (Tr. 69).

Witness Cohn testified that he had been employed by World Over from March, 1956, until February, 1957, to work in the office and also to make purchases. He was its sole employee most of the time during that period (Tr. 16, 28). He said that, with respect to all purchases by World Over, he prepared purchase orders, a copy of which was usually returned by the supplier with his acceptance. The suppliers also sent invoices of shipped material to

the corporation. The purchase orders, the acceptances, the invoices, and the covering letter customarily sent with the check for the payment of the merchandise, were usually filed by him in the file cabinet, together with all the other material pertaining to the transaction (Tr. 21–26).

As bearing on the question of petitioner's wilfulness, Cohn was allowed to testify that usually the material purchased for a far eastern customer was of an inferior quality (Tr. 27–28), and in most cases the yardage shipped to the far east was less than required by the order (Tr. 29). Mr. Cohn spoke to petitioner about this and petitioner said that he had "confidential correspondence" with the customer covering this matter at home. This arrangement was indicated in each order by an attached slip of paper which stated that the customer was to be billed for the full amount and "differences" would be arranged between them (Tr. 29–30). In some cases, the yardage varied from 20 or 30 percent less than ordered to as much as 70 percent less (Tr. 31).

Mr. Cohn said that as long as he worked for the corporation all of the papers relating to the far eastern transactions, including all of the transactions with the suppliers, were placed in the corporation's file cabinet (Tr. 31–32). He also said that, during his employment, petitioner had two other employees, one part-time, but they had nothing to do with the file (Tr. 36, 50).

At the conclusion of the government's case, petitioner indicated that he would submit no proof. The court said that the government had presented a *prima*

facie case and, that unless petitioner could explain the reason for the missing files, he would hold him for contempt, and the court so held (Tr. 79–80, 104). In order to purge himself of the contempt, petitioner testified. He attributed the loss of the documents to Mr. Cohn's slipshod manner in placing them in bundles on the floor, and said that the charwoman would throw them away. He said that, when he complained to the building superintendent about this, the superintendent told him that the charwomen were told to clean up and throw away papers left on the floor. Petitioner denied that he had destroyed any of the missing papers. He said that he had not seen any of the documents since the preceding December or January when he gave them to one of his accountants (Tr. 119–125, 142–143). On cross-examination, he said that none of his accountants ever took the records in question out of the office (Tr. 134–136). In answer to a question as to whether he could explain the loss of all the papers relating to his company's purchase of the merchandise shipped to Viet-Nam and Cambodia, petitioner said "No" (Tr. 139–140).

The court did not feel that petitioner's testimony warranted a reversal of its earlier holding of contempt. In the trial judge's view, it was incredible that the papers could disappear in the manner described by petitioner (Tr. 144–145).[3]

[3] The court also requested the government to have the F. B. I. interview the building superintendent, the charwoman, and the accountants in order to determine if there was any basis for petitioner's claim. Neither the record nor the transcript show anything further on this point (Tr. 144–145).

ARGUMENT

As the court below indicated (R. 59–60), the instant case is very similar to *United States* v. *Johnson*, 247 F. 2d 5 (C. A. 2), certiorari denied, November 12, 1957, No. 418, this Term, which also raised a question of the sufficiency of the evidence to support a conviction for contempt for nonproduction of corporate records.

This case is even stronger than *Johnson*. There, the existence of the records at the time the subpoena was served was inferred from the careful bookkeeping system testified to by the government witnesses. Here, there was not only testimony of a careful bookkeeping system, but direct testimony by the then custodian of the books of the existence of the records within a month of the time of the service of the subpoena. In *Johnson*, there was some evidence of a fire and civil litigation which, while not found sufficient to explain nonproduction, at least raised something of an issue. Here, there was absolutely no reasonable excuse why all the documents relating to the purchase of supplies eventually sold to Vietnam and Cambodia were missing, while those relating to the sale and shipment of such materials to Vietnam and Cambodia were left intact. Petitioner's attempt to explain the loss on the ground that the charwoman might have thrown them away resists all credulity, particularly here where the destruction appeared to be so systematic and selective.[1] In short, even more

[1] The fact that the judge ordered a further investigation does not cast doubt on the judge's decision of contempt. In his own words (Tr. 114–115) the judge was making certain that

than in the *Johnson* case, the trier of fact had the right to believe that carefully kept corporate records, which were shown to be in existence shortly before the subpoena was served, did in fact continue in existence up to the time the subpoena was served. The motive for nonproduction of this selected group of records was also shown.[5] The finding of wilful nonproduction was therefore amply justified.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
RUFUS D. MCLEAN,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

JANUARY 1958.

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petitioner was given every reasonable opportunity to explain the loss of the documents. That the government did not produce evidence as to the results of such interviews is not proof that the interviews, if any, were favorable to petitioner. These witnesses were available to petitioner, and he probably would have used them had he felt that they were favorable to him.

[5] The suggestion (Pet. 9, 13) that the F. B. I. agent's removal from petitioner's office of some 700 documents was sufficient compliance with the subpoena overlooks the fact that a group of documents important to the investigation, not just one or few random items, were missing when he was finally allowed to examine the documents. These missing documents were adequately described in the subpoena which petitioner did not attack in the district court. Petitioner, as is evident from his testimony, knew what those documents were.